No. 97-8214

RECEIVED
HAND DELIVERED
MAR 11 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

**IN THE SUPREME COURT OF THE UNITED STATES**
**October 1997 Term**

---

**ANGEL FRANCISCO BREARD**

***Petitioner,***

**v.**

**FRED W. GREENE, WARDEN,**

***Respondent.***

CAPITAL CASE
EXECUTION DATE

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

---

# PETITION FOR A WRIT OF CERTIORARI

**Imminent Execution Scheduled**
**April 14, 1998**

---

**Alexander H. Slaughter (VSB#05916)**
**(Counsel of Record)**
**William G. Broaddus (VSB#05284)**
**Dorothy C. Young (VSB#31155)**
**McGuire, Woods, Battle & Boothe LLP**
**One James Center, 901 East Cary Street**
**Richmond, Virginia 23219**
**(804) 775-1000**

**Michele J. Brace (VSB# 36748)**
**Virginia Capital Representation Resource Center**
**1001 East Main Street, Suite 510**
**Richmond, Virginia 23219**
**(804) 643-6845**

**Counsel for Petitioner**
**Angel Francisco Breard**

32 pp

**CAPITAL CASE**

**QUESTIONS PRESENTED**

1. Whether, under the United States Constitution's Supremacy Clause, Article 36(2) of the Vienna Convention on Consular Relations precludes the application of the bar of procedural default to claims brought pursuant to the consular notification provisions of Article 36(1) in a petition for a writ of habeas corpus.

2. Whether, at the time of Petitioner's direct appeal and state habeas proceedings, the applicability of the consular notification provision was "novel" so as to constitute cause for the procedural default of claims based upon a violation of that provision.

3. Whether Virginia's mandatory proportionality review was conducted by the Virginia Supreme Court in a manner so inherently defective that it violated Petitioner's state created life and liberty interests and denied him due process.

## TABLE OF CONTENTS


QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

LAW INVOLVED ..... 1

STATEMENT OF THE CASE ..... 3

Introduction ..... 3

Statement of Facts ..... 8

A. Breard, His Crime and Trial ..... 8

B. The Rights to Consular Notification and Access Provided by the Vienna Convention Are of International Importance ..... 13

REASONS FOR GRANTING THE WRIT ..... 15

I. The Writ Should Be Granted to Determine Whether an Explicit Provision of International Law, Which Has Become the Supreme Law of the United States, Takes Precedence Over a Judicially Created Doctrine that Ordinarily Applies to Domestic Litigation ..... 15

II. The Writ Should Be Granted to Determine Whether Novelty of the Law Provides Cause for the Default of a Post-conviction Claim, and Whether the Criminal Defense Bar's Virtually Universal Ignorance of the Vienna Convention and the State's Withholding of Information Excuse the Default of a Claim Brought under Article 36(1) ..... 20

III. The Writ Should Be Granted to Set Threshold Standards under the Due Process Clause for the Review that Most State Appellate Courts Perform When They Consider Whether a Sentence of Death is Excessive or Disproportionate ..... 23

A. Virginia Created a Life and Liberty Interest by Enacting Its Proportionality Review Statute . . . . . 23

B. The Virginia Supreme Court's Procedures Do Not Comply with the Life and Liberty Interests Accorded Petitioner by the Requirements of Virginia's Proportionality Review Statute. . . . . 24

C. The Virginia Supreme Court's Review of Petitioner's Case Denied Petitioner Due Process of Law. . . . . 26

CONCLUSION . . . . . 29

## TABLE OF AUTHORITIES

### CASES


Amadeo v. Zant, 486 U.S. 214 (1988) . . . . . 22

Banks v. Horn, 939 F. Supp. 1165 (M.D. Pa. 1996), *judgment vacated and remanded*, 126 F.3d 206 (3d Cir. 1997) . . . . . 28

Breard v. Commonwealth, 248 Va. 68, 445 S.E.2d 670 (1994) . . . . . 24

Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996), *aff'd sub nom.* Breard v. Pruett, __F.3d__, No. 96-25 (4th Cir. Jan. 22, 1998) . . . . . *passim*

Coleman v. Thompson, 501 U.S. 722 (1991) . . . . . 17, 20, 22

Eddings v. Oklahoma, 455 U.S. 104 (1982) . . . . . 24

Evitts v. Lucey, 469 U.S. 387 (1985) . . . . . 26, 27 n.18

Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996) . . . . . 4 n.4, 16 n.11, 21

Furman v. Georgia, 408 U.S. 238 (1972) . . . . . 27 n.18

Gideon v. Wainwright, 372 U.S. 335 (1963) . . . . . 6

Gregg v. Georgia, 428 U.S. 153 (1976) . . . . . 7, 23

Harris v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994), *aff'd*, 6 F.3d 1432 (9th Cir. 1995) . . . . . 26, 27 n.18, 28

Hartford Fire Ins. Co. v. Merrett Underwriting Agency Management Ltd., 509 U.S. 764 (1993) . . . . . 15

Hicks v. Oklahoma, 447 U.S. 343 (1980) . . . . . 27 n.18

Hilton v. Guyot, 159 U.S. 113 (1895) . . . . . 15

Hines v. Davidowitz, 312 U.S. 52 (1941) . . . . . 16, 20

Jenkins v. Commonwealth, 244 Va. 445, 423 S.E.2d 360 (1992), *cert. denied*, 507 U.S. 1036 (1993) . . . . . 24, 28

Kovlorat v. Oregon, 366 U.S. 187 (1961) ..... 16

Mami v. Van Zandt, No. 89 Civ. 0554, 1989 U.S. Dist. LEXIS 5002
(S.D.N.Y. May 9, 1989) ..... 21 n.15, n.16

Miranda v. Arizona, 384 U.S. 436 (1966) ..... 6

Missouri v. Holland, 252 U.S. 416 (1920) ..... 16

Murphy v. Netherland, C.A. No. 3:95CV856, slip op. (E.D. Va. July 26, 1996), *aff'd*,
116 F.3d 97 (4th Cir. 1997) ..... *passim*

Peterson v. Murray, 904 F.2d 882 (4th Cir.), *cert. denied*, 498 U.S. 992 (1990) ..... 27 n.18

Pulley v. Harris, 465 U.S. 37 (1984) ..... 26

Reed v. Ross, 461 U.S. 1 (1984) ..... 20

Republic of Paraguay v. Allen, __F.3d__, No. 96-2770, slip op. (4th Cir. Jan. 22, 1998)
*petition for cert. filed sub nom.* Republic of Paraguay v. Gilmore,
(No. 97-1390)(U.S. Feb. 24, 1998) ..... *passim*

Shaw v. Martin, 733 F.2d 304, 317 (4th Cir.), *cert. denied*, 469 U.S. 873 (1984) ..... 27 n.18

Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*,
419 U.S. 1108 (1975) ..... 27 n.18

Spaziano v. Florida, 468 U.S. 447 (1984) ..... 23

State v. Bland, 1997 WL 736369 (Tenn. 1997), *petition for cert. filed*, (U.S. Feb. 23, 1998)
(No. 97-8033) ..... 28

State v. Cobb, 234 Conn. 735, 663 A.2d 948 (1995) ..... 28

State v. Marshall, 130 N.J. 109, 613 A.2d 1059 (1992), *cert. denied*, 507 U.S. 929 (1993) ..... 28

Teague v. Lane, 489 U.S. 288 (1989) ..... 17 n.12

Trest v. Cain, __U.S.__, 118 S. Ct. 478 (1997) ..... 16

United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997), *petition for cert. filed*,
(U.S. Feb. 18, 1998)(No. 97-1365) ..... 4 n.4, 7 n.6

United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979) ..... 16 n.11, 21 n.15

United States v. Pink, 315 U.S. 203, 231 (1942) ..... 16

United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980) . . . . . 21 n.15

United States v. Vega-Mejia, 611 F.2d 751 (9th Cir. 1979) . . . . . 21 n.15

Waldron v. I.N.S., 17 F.3d 511 (2d Cir. 1993) . . . . . 21 n.15

Wolff v. McDonnell, 418 U.S. 539 (1974) . . . . . 26

Woodard v. Ohio Adult Parole Auth., __U.S.__, 118 S. Ct. 333 (1997) . . . . . 30

**CONSTITUTION, TREATIES AND STATUTES**

U.S. Const. art. VI, cl.2 . . . . . 3

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 590 U.N.T.S. 261 . . . . . 3, 13

Va. Code Ann. § 8.01-654.1 . . . . . 4 n.2, 17 n.12

Va. Code Ann. § 17-110.1(A) . . . . . 8 n.7, 25

Va. Code Ann. § 17-110.1(C)(2) . . . . . 26

Va. Code Ann. § 17-110.1(E) . . . . . 23

Va. Code Ann. § 17-116.05:(A)(i) . . . . . 8 n.7, 25

Va. Code Ann. § 17-116.08 . . . . . 8 n.7, 25

**MISCELLANEOUS**

Sen. Exec. Rep. No. 9, 91st Cong., 1st Sess. (1969) . . . . . 16 n.11

Rest. 3rd, Restatement of the Foreign Relations Law of the United States (1987) . . . . . 5, 16

John L. Costello, Virginia Criminal Law and Procedure, (1991, 1993 Cum. Supp.) . . . . . 21 n.14

Luke T. Lee, Consular Law and Practice 145 (2d ed. 1991) . . . . . 18

James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure (2d ed. 1994) . . . . . 21 n.14

The Federalist (Masters, Smith & Co. ed. 1852) . . . . . 6, 29

Ronan Doherty, Foreign Affairs v. Federalism, 82 Va. L. Rev., 1281 (1996) . . . . . 18

U.N. GAOR, Conference on Consular Relations, 12th plen. mtg., agenda item 10, ¶¶2-9, U.N. Doc. A/CONF. 25/SR.12, 17 April 1963, at 1, *represented in* 1 Off. Rec. 40 . . . . . 17

United States Department of State, 7 Foreign Affairs Manual . . . . . 6, 14

Memorial of the United States to the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran filed in response to the 1979 storming of the American Embassy . . . . . 14, 18

Department of State Telegram 40298 to Embassy Damascus, Feb. 21, 1975 . . . . . 19

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, No. 96-25, 1998 WL 19920 (Feb. 18, 1998), App. 1-12, is not yet reported. The opinion of the United States District Court, App. 13-36, is reported at 949 F. Supp. 1255 (E.D. Va. 1996).

## JURISDICTION

The Court of Appeals entered judgment on January 22, 1998, and denied rehearing on February 18, 1998. App. 80. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## LAW INVOLVED

The Supremacy Clause of the United States Constitution, article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 provides, in relevant part:

Article 36

Communication and contact with nationals of the sending state

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

(a) consular officers shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state;

(b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

***

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

Virginia's proportionality review statute, Virginia Code § 17-110.1, provides in relevant part:

§ 17-110.1. Review of death sentence. -- A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

***

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

***

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

***

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive.

## STATEMENT OF THE CASE

### Introduction

Angel Francisco Breard, petitioner, is a Paraguayan citizen currently on Death Row in Virginia's Mecklenburg Correctional Center. He seeks federal habeas corpus relief. The authorities of the Commonwealth of Virginia have stipulated that Mr. Breard was not advised of his rights to consular notification and access under Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention" or the "Convention" or the "treaty") prior to being tried and sentenced to death in Arlington County, Virginia in 1993. App. 180-81. The treaty explicitly required that he be so advised. As a treaty, entered into by the President of the United States with the advice and consent of the Senate, the Convention is the "supreme law of the land." U.S. Const. art. VI, cl.2. The Republic of Paraguay brought suit seeking redress of its own rights under the Convention in connection with the proceedings against Mr. Breard, and its Petition for a Writ of Certiorari has been filed with this Court.[1]

Mr. Breard did not contest the violation of his rights under the treaty at trial, on direct appeal, or in his state habeas corpus petition because neither he nor his counsel knew of the Convention. In federal habeas proceedings, he asserted that he was convicted and sentenced in violation of Article

---

[1] *See* Republic of Paraguay v. Gilmore, No. 97-1390, *petition for cert. filed*, Feb. 24, 1998.

36(1) of the Convention, but the federal courts held that the claim had been defaulted.[2] This petition raises two issues regarding the purported default of his claim.

First, the language of the treaty expressly exempts claims under Article 36(1) from the judicially created doctrine of procedural default. Second, if claimed violations of Article 36(1) are capable of being procedurally defaulted, the utter unfamiliarity of the American criminal defense bar and habeas corpus counsel with the Convention establishes cause to excuse such procedural default. Mr. Breard clearly can establish prejudice because he would have accepted the state's proffered plea bargain if he had received instruction from his own consular authorities on the American legal system and the culture which produced it, and how they differed from those of southern Latin America where he had been raised.

It appears that violating the requirements of Article 36 of the Vienna Convention is the norm, not only in Virginia[3], but throughout the United States.[4] In fact, various high state officials have publicly questioned the applicability and the binding effect of the Convention with respect to the criminal law enforcement activities of the states. Frank Green, a reporter for the Richmond Times-Dispatch, wrote an article in the September 17, 1997 edition concerning the murder conviction of

---

[2]Virginia law provides no mechanism for a petitioner under a sentence of death to exhaust a claim by bringing a second petition. Under Va. Code § 8.01-654.1, "[n]o petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after" this Court's denial of certiorari on direct appeal.

[3]Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) ("Virginia's persistent refusal to abide by the Vienna Convention troubles the Court."), *aff'd sub nom.* Breard v. Pruett, __F.3d__, No. 96-25 at 10 (4th Cir. Jan. 22, 1998); Murphy v. Netherland, CA No. 3:95CV856, slip op. at 6-8 (E.D. Va. July 26, 1996)("The Court does not condone what appears to be Virginia's defiant and continuing disregard for the Vienna Convention."), App. 43-45, *aff'd*, 116 F.3d 97 (4th Cir.), *cert. denied*, 118 S. Ct. 26 (1997).

[4]*See, e.g.*, United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997) (Arizona); Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996) (Texas).

Mexican Mario Murphy, that Virginia's former Governor, George F. Allen, "disputed whether it was Virginia's responsibility to notify Murphy a foreigner on death row of his Vienna Convention right." App. 293-95. *See* n. 13, *infra*. In that same case, the state prosecutor who oversaw the legal proceedings against Murphy was reported by The Virginian-Pilot & Ledger Star of Norfolk to have described an assertion of rights under Article 36 as "completely ridiculous" and to question whether such rights were enforceable: "I mean, what is the remedy? I suppose Mexico could declare war on us." App. 296-98. The General Counsel to Texas Governor George W. Bush reportedly protested a request by the U.S. Department of State for information concerning possible violations of Article 36 by Texas law enforcement officials on the ground that "the State of Texas is not a signatory to the Vienna Convention." Al Kamen, Virtually Blushing, The Washington Post, June 23, 1997, at A17. App. 299-301. The Executive Director of the Association of Retired Police Chiefs in Washington, D.C. is reported to have stated about foreigners' Vienna Convention rights that "[i]n my 47 years in law enforcement, I have never seen anything from the State Department or FBI about this." Margaret A. Jacobs, Some Convictions of Foreigners in U.S. Stir Debate Over Rights, The Wall Street Journal, Nov. 4, 1997, at B5. App. 302-03.

Mr. Breard is one of approximately 60 foreign nationals on America's death rows who apparently were convicted and sentenced to death in violation of the Convention. The effect of the states' blatant disregard of obligations imposed on them by treaty raises important issues of federal law never addressed by this Court. Only this Court has the authority to determine and interpret international law for all courts in the United States. Restatement (3rd) of the Foreign Relations Law of the United States § 112(2). The Supreme Court has an obligation to ensure that states comply

with federal law, particularly when the rights of foreigners and foreign nations are involved. The Federalist, No. 80 (Alexander Hamilton)(Masters, Smith & Co. ed. 1852).

The Vienna Convention is of great significance, not only to foreign nationals detained in the United States, but also to United States citizens traveling abroad who depend on the observance of their rights under the Convention by other nations.[5] The treaty functions as a "cultural bridge" and bestows on foreign nationals rights comparable to those accorded all persons pursuant to this Court's opinions in Gideon v. Wainwright, 372 U.S. 335 (1963), and Miranda v. Arizona, 384 U.S. 436 (1966). Indeed, our State Department, speaking on behalf of American citizens, has described one of the rights provided by Article 36 of the Vienna Convention as follows:

> . . . the host government *must notify the arrestee without delay of the arrestee's right* to communicate with the American consul.
>
> ***
>
> [This] provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government . . . *at a time when such information is most useful*.

United States Department of State, 7 Foreign Affairs Manual ¶¶ 411.1, 412 ("Chapter 400") (emphasis added). App. 280-81.

This case presents the Court with an opportunity to settle a conflict between compliance with treaty obligations and the judicially created doctrine of procedural default. In the courts below, the latter has been allowed to override the former and thereby cause those courts to sanctify admittedly

---

[5]Figures available from the International Trade Administration, Tourism Industries, show over 50 million trips abroad annually by United States residents in recent years. *See* Abstract of International Travel, Tourism Industries, International trade Administration, http://tinet.ita.doc.gov/abst_ at 5-7. App. 285-92.

outrageous treaty violations by the states. To make matters worse, Paraguay's action[6] brought to vindicate its rights in the Breard matter has been dismissed below on Eleventh Amendment grounds. Hence, the grand sounding rights extended to foreign states and their citizens, as well as the solemn duties imposed upon each of the United States, have proven to be illusory. If it is the law of the United States that treaty rights and duties are subordinate to domestic judge-made law, then this Court should say so. If the converse is true, this Court, in exercising its constitutional role in foreign affairs, should enforce the treaty.

This Court should also review Mr. Breard's case because his death sentence was the product of Virginia's fundamentally flawed capital punishment system. Virginia, like many states in the aftermath of Gregg v. Georgia, 428 U.S. 153 (1976), adopted statutory procedures for capital punishment like those upheld in Gregg. One of the procedures mandated by state law is a proportionality review of the sentence by the Virginia Supreme Court. This vests in those sentenced to death a state-created life and liberty interest protected by the Constitution.

While the Virginia Supreme Court is required in every case to compare the death sentence under review with the sentences imposed in similar cases throughout the state, that court, in fact, compares any given case only to the cases *previously reviewed on appeal by that court*. The effect of Virginia's arbitrary mechanism is dramatically illustrated by Mr. Breard's case. The majority of capital cases similar to Mr. Breard's during the period 1985-1995 *resulted in a sentence less than death*; however, only a small portion of those cases were included in the Virginia Supreme Court's

---

[6]*See* Republic of Paraguay v. Allen, __F.3d__, No. 96-2770, 1998 WL 19933 (4th Cir. Jan. 22, 1998), *petition for cert. filed sub nom.* Republic of Paraguay v. Gilmore, (U.S. Feb. 24, 1998)(No. 97-1390); United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997), *petition for cert. filed*, (U.S. Feb. 18, 1998)(No. 97-1365).

review *because most had not been appealed to that court*.[7] The same systemic error may infect the proportionality review of every death case. The review of a skewed pool of cases effectively denies capital defendants the statutorily mandated review of "similar cases" and deprives them of their life and liberty interests without due process of law.

This case presents this Court with the opportunity to settle an important question of federal law concerning the extent to which courts must honor state-created life and liberty interests in appellate procedures in death penalty cases.

## Statement of Facts

### A. Breard, His Crime and Trial

Angel Francisco Breard was born in Argentina, his father's native land, in 1966. In 1978 his family moved to his mother's family's home in Paraguay, and Mr. Breard later adopted Paraguayan citizenship. In 1986, at the age of 20, he came to the United States. App. 112, ¶ 23. He married in 1987, but the marriage lasted less than six months. App. 110, ¶ 17. In 1992, depressed and drunk, Mr. Breard committed a murder in the course of an attempted rape.

Mr. Breard was arrested on September 1, 1992 and charged with capital murder and attempted rape. App. 107, ¶ 4. Virginia has stipulated that he was not, at the time of his arrest or at any time thereafter, informed by Virginia or local authorities of his right pursuant to Article 36 of the Vienna Convention to contact the Paraguayan and/or the Argentine consulates for assistance

---

[7] All convictions resulting in a death sentence are automatically appealed to the Virginia Supreme Court. Convictions resulting in life or a term of years can be appealed only to the intermediate-level appellate court. If the intermediate court affirms the life sentence, the defendant can petition for appeal to the Virginia Supreme Court. Va. Code Ann. §§ 17-110.1(A); 17-116.05:1(A)(I); 17-116.08.

in his defense. App. 180-81. He did not become aware of that right until his direct appeal and state habeas corpus proceedings had been concluded.

Prior to trial, the Commonwealth "made it clear to [Breard's attorneys] that the Commonwealth would forego the death penalty if Mr. Breard would plead guilty." Affidavit of trial counsel, App. 195, ¶ 5.[8] Trial counsel had "investigated the Commonwealth's evidence against Mr. Breard and satisfied [themselves] that the prosecution would be able to prove Breard's guilt beyond a reasonable doubt." Id., App. 194-95, ¶ 4. Nevertheless, against the advice of his counsel, Mr. Breard refused the offer of a life sentence and pled not guilty. Unfamiliar with the law and culture of the United States, he had decided instead "to testify and admit his guilt" to the jury in the hope that the jury would set him free upon learning that a satanic curse, now lifted, had been responsible for the crime. Id., App. 199, ¶ 16, and attached memorandum, App. 202.01-.02.

The Commonwealth's case against Mr. Breard was based entirely on DNA. The prosecution introduced no incriminating statements. After the prosecution rested, Mr. Breard took the stand in order to confess his crime to the jury. He testified that a satanic curse had been placed upon him by his former father-in-law, that the curse had caused him to commit the murder, and that the curse had been lifted upon his finding Jesus Christ after his arrest.

On direct examination, he described the curse and his release from it as follows:

> A. What I was going through is full of thought that came to my mind and keep coming to my mind and more than that, that I know now, is that everything is a spiritual thing, it's -- it's a warfare, it's a bitter warfare, it's something that you can't see, you can't touch it, but it's there. You feel it and it's powerful.

---

[8]This affidavit was procured by the Commonwealth and introduced by it against Breard in his state habeas proceeding.

Q. What was causing these thoughts to your --

A. Was causing?

Q. Yes.

A. Well, I believe deeply everything was causing all that, it is Satanic practice against myself.

Q. And who initiated this Satanic practice against you?

A. My father-in-law.

***

All I was doing is seeking for myself, destruction for myself. In doing so I kill someone else.

***

Q. [N]ow, is this curse still affecting you?

A. No.

Q. Why not?

A. It was very simple, because now I found Jesus, I just have him in my heart and my life, so now I'm free of all that. And in a way there is many things that I learned, and I learned speaking to him here in jail. And one thing that he said, if you keep my commandments you shall know the truth, and the truth shall make you free. If you keep my commandments you'll be truly my disciple.

So that does not affect me any more.

Q. Is there anything also about what happened that night that you want this jury to know?

A. Well, one important thing is that I never ever thought -- intend to kill her or to kill anyone. No, I did it as the fact. I did it, but I -- no, that's the best way I can explain to you. How it happened. I didn't want to do it, but it happened.

App. 215-22.

The Arlington County jury, predictably, did not set him free. He was convicted on all charges. After finding Mr. Breard guilty, the jury heard evidence pertinent to sentencing.

The jury deliberated for approximately 6½ hours on the question of penalty. During its deliberations, the jury twice sent out notes to the judge asking questions that showed its struggle with the decision between life imprisonment and death. The first question was, "with life in prison how long will he be there before he is eligible for parole?" App. 228. The trial judge instructed the jury that he could not answer the question and the jury should not concern itself with the possibility of parole. In colloquy with trial counsel, the Court observed, "it seems bizarre that we as a Commonwealth entrust jurors with a decision like this and won't tell them the reality of what their choices are." Id.

The second question was whether the jury can "recommend the sentence of life without the possibility of parole." Id., App. 229. In response, the Court instructed the jury that it must limit itself to the three choices previously outlined in the instructions: death, life imprisonment, or life imprisonment plus a fine. Ultimately, the jury fixed the sentence at death, and, on August 20, 1993, the trial judge held a sentencing hearing and imposed the death sentence. App. 232-35.

In sum, throughout the trial proceedings, due to his lack of understanding, Mr. Breard forced his American court-appointed attorneys to take a number of steps, against their advice, which were contrary to his best interest. For example:

> (a) Mr. Breard refused the proffered plea agreement in which the Commonwealth would seek only a life sentence if he would plead guilty, id., App. 195, ¶ 5;

(b) Mr. Breard insisted upon testifying on his own behalf, confessing his guilt, and explaining the events of February 17, 1992 as the only eyewitness to them, id.;

(c) Mr. Breard urged his attorneys not to call mitigation witnesses. They refused his directive on that occasion, id., App. 197, ¶ 9;

(d) Mr. Breard refused to permit his family members to be called as witnesses at the post-trial hearing on a motion to set aside the death penalty, id.;

(e) Mr. Breard refused to permit his attorneys to renew a pretrial motion to declare unconstitutional Virginia's method at that time of carrying out the death sentence, id.[9]

Never during the entirety of the proceedings against him was Mr. Breard informed of his right to contact the consulates of Paraguay and Argentina. Nor were those consulates informed of the detention and trial of their citizen or the imposition of the death sentence upon him, despite the Commonwealth's knowledge that Mr. Breard was a foreigner. App. 180-81. Since becoming aware of his plight (from sources other than American federal or state authorities), both Paraguay and Argentina have made every effort to assist Mr. Breard and have made clear that they would have done so sooner had they known of his arrest, detention and trial. Both nations have filed affidavits in this case describing the assistance they would have provided to Mr. Breard. App. 182-89; 190-93. Paraguay has also filed a separate lawsuit in an effort to vindicate its own Vienna Convention rights.[10]

---

[9]A similar motion had been made in a Loudoun County, Virginia, case, supported by extensive expert evidence, and the prosecution dropped the capital murder charge there to moot that motion. App. 130-31 , ¶¶ 72, 73. In Mr. Breard's case, a similar pre-trial effort was made, but the trial judge ruled that the motion was premature and denied it with leave to renew it if Breard were convicted and given the death penalty. Preliminary Hearing, App. 205-14.

[10]*See* Paraguay's Petition for a Writ of Certiorari in this Court, Republic of Paraguay v. Gilmore, Docket No. 97-1390, *petition for cert. filed Feb. 23, 1998.*

## B. The Rights to Consular Notification and Access Provided by the Vienna Convention Are of International Importance

When a foreign national of a signatory nation to the Vienna Convention on Consular Relations is arrested in another signatory nation, the Convention requires the latter to notify the arrested person of his right to contact his consulate. Article 36 of the Vienna Convention provides, in pertinent part:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:
>
> (a) consular officers shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communications with and access to consular officers of the sending state;
>
> (b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;*
>
> ***
>
> 2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said *laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.*

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 590 U.N.T.S. 261 (emphasis added).

The Convention was ratified with the advice and consent of the United States Senate in 1969, and is, thus, one of the laws of the United States. Statements of the United States Department of State repeatedly emphasize that Article 36 confers on the arrested or detained person the right to be informed of his right to consular notification. *See* Memorial of the United States to the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran filed in response to the 1979 storming of the American Embassy ("Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others").

To reinforce the Convention's obligations, the United States State Department regularly sends notices to governors, state attorneys general, and mayors of cities having a population in excess of 100,000 advising them of their duties under the Vienna Convention and the importance of complying with its terms. App. 236-37. In August 1991 and October 1992, the State Department sent such notices to Virginia's Governor and Attorney General. App. 238-73.

The State Department also instructs United States consulates in other nations that the Vienna Convention requires that "the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul." Chapter 400, ¶ 411.1, App. 280. According to the State Department, immediate access allows the consular official to act as a "cultural bridge" between the arrested person and the arresting state at the time of the arrestee's greatest need to understand his rights under the foreign government's system of laws, the legal and judicial procedures facing him, and the local cultural norms. *See* id. App. 280-81, ¶¶ 401, 412. The State Department notes that "no one needs that cultural bridge more than the [individual] . . . who has been arrested in a foreign country. . . ." Id.

Moreover, as Judge Butzner wrote in his concurring opinion in the Court of Appeals:

> The protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered around the world -- as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that "international law is founded upon mutuality and reciprocity . . . ." Hilton v. Guyot, 159 U.S. 113, 228 (1895).
>
> ***
>
> . . . The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation.

Breard v. Pruett, __F.3d__, No. 96-25, slip op. at 11-12 (4th Cir. Jan. 22, 1998). App. 11-12.

## REASONS FOR GRANTING THE WRIT

### I. The Writ Should Be Granted to Determine Whether an Explicit Provision of International Law, Which Has Become the Supreme Law of the United States, Takes Precedence Over a Judicially Created Doctrine that Ordinarily Applies to Domestic Litigation

Under settled principles, the judicially created doctrine of procedural default in habeas corpus must be construed and applied in such a manner as to permit full effect to be given to the will of the political branches of the federal government clearly expressed in a treaty of the United States. *See, e.g.*, Hartford Fire Ins. Co. v. Merrett Underwriting Agency Management Ltd., 509 U.S. 764, 814-15 (1993) (domestic law must be construed so as to be consistent with the United States' international law obligations unless no other construction is possible). These principles apply with particular force to the procedural default doctrine because that doctrine is founded on federal deference toward

the state's traditional regulation of criminal proceedings. *See*, Trest v. Cain, __U.S.__, 118 S. Ct. 478 (1997) (procedural default is not jurisdictional, but is an affirmative defense grounded in concerns of comity and federalism). State concerns are entitled to no deference when they conflict with a treaty, as to which the federal government's control is exclusive. *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187, 198 (1961) (treaty overrides state laws regulating the descent and distribution of estates); United States v. Pink, 315 U.S. 203, 231 (1942) ("the power of a State to refuse enforcement of rights [based on State policy considerations] . . . must give way before the superior Federal policy evidenced by a treaty or International compact or agreement"); Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) ("[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land"); Missouri v. Holland, 252 U.S. 416, 433-35 (1920) (treaty and federal statute protecting migratory birds override state's power to act in that area); Restatement (3rd) of the Foreign Relations Law of the United States § 115 cmt e.

In agreeing to the Vienna Convention, the United States approved language that expressly exempts Article 36 rights from the operation of any country's laws that would prevent full effect from being given to the purposes for which Article 36 exists. [11] The United States entered no reservation with respect to that language. *Cf.* Restatement (3rd) of the Foreign Relations Law of the United States§ 314 (describing ability of nations to enter reservations with respect to treaty provisions). Paragraph 2 of Article 36 provides:

---

[11]The Convention is self-executing. Breard v. Pruett, __F.3d__, No. 96-25, slip op. at 11 (Butzner, J. concurring), App. 11.; Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979); Sen. Exec. Rep. No. 9, 91st Cong., 1st Sess., App. at 5 (1969) (statement of U.S. State Department Deputy Legal Adviser noting that the United States regards the Vienna Convention to be "entirely self-executing").

> The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that *the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.*

Emphasis added.

No signatory country can so burden the exercise of the arrestee's right to be informed of his rights that the "purposes" of the right are compromised or lost. Significantly, during the drafting of Article 36(2), the Soviet Union offered an amendment which would have permitted domestic law to impair the rights accorded in Article 36(1) so long as they did not render them nugatory. In support of the USSR's proposed amendment, Mr. Khlestov stated that, as drafted (and ultimately adopted), Article 36(1) could "force states . . .to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedures in order to protect alien offenders" U.N. GAOR, Conference on Consular Relations, 12th plen. mtg., agenda item 10, ¶¶2-9, U.N. Doc. A/CONF. 25/SR.12, 17 April 1963, at 1, *represented in* 1 Off. Rec. 40; *see* id. The foregoing analysis by the U.S.S.R. spokesman was correct. That was the whole idea.

The doctrine of procedural default was articulated by this Court in Coleman v. Thompson, 501 U.S. 722, 750 (1991), as applying to "all cases in which a prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule."[12] The doctrine is designed, among other things, to promote comity between the states and the federal courts. Petitioner does not contend that rights granted by treaty can never be defaulted. He does contend,

---

[12]The Vienna Convention claim is considered simultaneously exhausted and defaulted under this Court's rule in Teague v. Lane, 489 U.S. 288 (1989), because state law prohibits Mr. Breard from returning to state court to present the claim. *See* Va. Code Ann. § 8.01-654.1.

however, that the specific language of Article 36(2) precludes such default of Article 36(1) rights *in these circumstances*. Application of the procedural default doctrine to postconviction claims under Article 36(1) would result in a failure to enable "full effect" to be given to the rights there granted, where, as here, the petitioner was ignorant of his rights (of which the state had the unequivocal duty to inform him) during the entire time he was litigating in the state judicial system.

If the courts disregard Virginia's "defiant and continuing disregard for the Vienna Convention," the federal judiciary will strip away the fundamental protections provided by the Vienna Convention in this country. The effect would be to invite similar behavior by other signatories. *See* Butzner, J., concurring below. The United States' interest in protecting these rights was brought home by the lawlessness and barbarism of those who overran the American Embassy in Tehran, Iran in 1979. Taking 52 American diplomats and civilians hostage, Iran deprived them of all access to the outside world for 444 days. The United States reacted with outrage and pressed its case before the International Court of Justice, where it proclaimed to the world that "the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations." Memorial of the United States to the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran filed in response to the 1979 storming of the American Embassy.

In an earlier incident, the United States protested Syria's 1975 arrest of two American citizens and its failure to notify the American Embassy. Ronan Doherty, Foreign Affairs v. Federalism, 82 Va. L. Rev., 1281, 1318 n.165 (1996), citing Luke T. Lee, Consular Law and Practice 145 (2d ed. 1991). In a telegram to the Syrian authorities, the United States felt it necessary to

remind them that the Vienna Convention was a solemn treaty obligation, and stated that "[t]he Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to those nationals." Id., quoting Department of State Telegram 40298 to Embassy Damascus, Feb. 21, 1975. As matters have developed, however, any such Syrian confidence would have been misplaced.

Notwithstanding the great weight attached by the federal government to the Vienna Convention and to the personal rights guaranteed by its provisions, the individual states have long ignored legal obligations imposed upon them by the Convention. Indeed, the District Court expressly found in Mr. Breard's case that Virginia has engaged in a "persistent refusal to abide by the Vienna Convention." Breard v. Netherland, 949 F. Supp. 1255 1263 (E.D. Va. 1996).[13] App. 23.

The broad national interest of protecting Americans abroad and the protection of individual rights necessary to a fair trial suggest that this Court should grant certiorari in this case to determine whether the Convention's Article 36 can be rendered meaningless by application of the domestic doctrine of procedural default. As this Court has previously stated, "Experience has shown that

---

[13]In Murphy v. Netherland, C.A. No. 3:95CV856, slip op. (E.D. Va. July 26, 1996), in which a Mexican national raised claims under the Vienna Convention, the same District Court Judge found that Virginia has demonstrated a "defiant and continuing disregard for the Vienna Convention." Id. at 7. App. 44. Moreover, as noted above, while considering Mr. Murphy's then-pending clemency petition, the then-Governor of Virginia is said to have "disputed whether it was Virginia's responsibility to notify Murphy of his Vienna Convention right." App. 293-95. This sort of misconception at the highest level of state government must be remedied, and can be remedied only if this Court takes action to make clear to the states that it is imperative for state officials to understand and abide by the obligations imposed by the Vienna Convention.

In that same news article, the Legal Adviser to the State Department is quoted as saying that the State Department would "convey to the Embassy of Mexico on behalf of the government of the United States, our deepest regrets over the apparent failure to provide Mr. Murphy with consular notification." Such offers to make post-execution expressions of regret cannot be the hallmark of American justice, particularly when the ultimate event requiring that regrets be tendered had not yet occurred and was made inevitable only by the inaction of the United States.

international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." Hines v. Davidowitz, 312 U.S. at 64.

## II. The Writ Should Be Granted to Determine Whether Novelty of the Law Provides Cause for the Default of a Post-conviction Claim, and Whether the Criminal Defense Bar's Virtually Universal Ignorance of the Vienna Convention and the State's Withholding of Information Excuse the Default of a Claim Brought under Article 36(1)

If Vienna Convention claims are subject to procedural default, the Court should decide whether that default must be excused in this case because Mr. Breard's counsel, like nearly every other criminal defense lawyer in the country, did not know about the consular notification provision in the treaty and would not have discovered it in the course of reasonable and diligent investigation. As this Court made clear in Reed v. Ross, 468 U.S. 1 (1984), an attorney's failure to assert a claim based upon federal law, so novel that its legal basis was not reasonably available, cannot be the basis of a procedural default. Breard has consistently asserted that the novelty of Vienna Convention claims prior to 1996 constitutes cause to excuse any procedural default. *See* id. at 16.

Proof of "cause" typically requires something external to the petitioner which is not attributable to him. Coleman v. Thompson, 501 U.S. 722, 753 (1991). Although known in certain diplomatic and immigration law circles, the consular notification provisions of the Vienna Convention were not discussed in any published criminal law or habeas case outside of the deportation context until April 1996, two years after Mr. Breard had completed his direct appeal and

three months after the conclusion of state postconviction proceedings.[14] The only published court decisions concerning these rights before 1996 arose in the context of immigration and deportation proceedings.[15] The Convention is not published in the United States Code. It is not published in the Virginia Code. The consular notification rights conferred by Article 36 are not listed in the relevant criminal law subject-matter indices of United States Treaties and are not referenced in any American criminal law treatise or habeas corpus treatise. In sum, there is simply no reason to believe, as the Court of Appeals suggested, Breard v. Pruett, No. 96-25, slip op. at 6-7 (4th Cir. Jan. 22, 1998), App. 6-7, that any reasonably competent practicing criminal lawyer would have or should have known of the Convention before the publication in 1996 of the Fifth Circuit's opinion in Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996).[16]

The states, however, did know about the protections offered by the Vienna Convention. As noted above, the U.S. Department of State regularly sends notices to every state's governor, attorney

---

[14]One unpublished habeas opinion available on Lexis mentioned a refusal to permit consular access under the Convention, Mami v. Van Zandt, No. 89 Civ. 0554, 1989 U.S. Dist. Lexis 5002 (S.D.N.Y. May 9, 1989), but, as an unpublished opinion, it was not readily available to practitioners, and, in any event, it did not relate to the notification requirements of the Convention. It was not until April 1996 that a published opinion provided generally available notice of the existence of rights under the Vienna Convention that might be applicable to criminal law proceedings other than deportation proceedings. Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996). The criminal law and habeas treatises in this field do not mention the treaty and are of no help. *See, e.g.*, John L. Costello, Virginia Criminal Law and Procedure (Michie Co. 1991, 1993 Cum. Supp. and 1994 Cum. Supp.); James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure (2d ed. Michie Co. 1994).

[15]United States v. Vega-Mejia, 611 F.2d 751 (9th Cir. 1979) does not mention the treaty. Waldron v. I.N.S., 17 F.3d 511 (2d Cir. 1993), *cert. denied*, 513 U.S. 572 (1994), United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980), and United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979), which discuss the treaty, do not have any criminal law head notes. As noted above, Mami v. Van Zandt, No. 89 Civ. 0554, 1989 U.S. Dist. Lexis 5002 (S.D.N.Y. May 9, 1989), a habeas corpus case, was not reported in official reports and was not readily available.

[16]Faulder's attorney, Sandra Babcock, submitted an affidavit which was filed in the Court of Appeals in Murphy v. Netherland, C.A. No. 3:95CV856, slip op. (E.D. Va. July 26, 1996), in which she states that she did extensive research in connection with Mr. Faulder's case but learned of the Vienna Convention "purely by chance" only when a Canadian consular official, unsolicited, told her about it. App. 282-84.

general, and to mayors of cities of over 100,000, reminding them of their legal obligations under the Vienna Convention. Of particular import with respect to Mr. Breard's September 1992 arrest, the State Department sent out such notices in August 1991 and October 1992. App. 238-73.

Where the prosecutors had the necessary information but ignored their legal duty to convey it to its intended recipients, and where there is no objective reason to expect any reasonably competent defense attorney to have such knowledge, cause has been established. *See* Coleman v. Thompson, 501 U.S. 722, 753 (1991) (interference by officials making "compliance impracticable, would constitute cause" for procedural default); Amadeo v. Zant, 486 U.S. 214, 221, 222-24, 228-29 (1988) (where document was discovered by mere fortuity after it had been effectively "concealed" in state public records, cause existed to override procedural default of claim). To do otherwise not only condemns foreign nationals for an ignorance that no reasonable person could expect them to have overcome, but rewards the states for their wilful violation of federal law.

While Mr. Breard does not concede that he must show prejudice with respect to a Vienna Convention violation because it is a structural error, he has nonetheless made an affirmative showing of prejudice. He was offered a life sentence in exchange for a guilty plea, and he rejected the bargain because of his culturally based belief that the jurors would acquit him once they understood that he had been under a satanic curse that had been lifted when he found Christ. It is no answer that Mr. Breard had court-appointed American trial counsel to advise him. He needed the cultural bridge of a consul who had an understanding of both the North American and South American cultures and legal systems.

If procedural default may apply to the treaty, Mr. Breard suggests that this Court should grant certiorari to evaluate the applicability of the default doctrine where a state has violated its federally-

created duty to disclose information critical to a defendant's fair trial when only the state knew of the information.

## III. The Writ Should Be Granted to Set Threshold Standards under the Due Process Clause for the Review that Most State Appellate Courts Perform When They Consider Whether a Sentence of Death is Excessive or Disproportionate

### A. Virginia Created a Life and Liberty Interest by Enacting Its Proportionality Review Statute

Virginia, like many states, adopted a statutory procedure for the review of death penalty cases similar to the procedures reviewed and upheld in Gregg v. Georgia, 428 U.S. 153 (1976). Under Virginia's procedure, the Supreme Court of Virginia is required to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Va. Code Ann. § 17-110.1(C)(2). With respect to the required proportionality review, the statute provides:

> The Supreme Court may accumulate the records of all capital felony cases for such period of time as the Court may determine. The Court *shall consider such records as are available* as a guide in determining whether the sentence imposed in the case under review is excessive.

Va. Code Ann. § 17-110.1(E) (emphasis added).

Thus, the Virginia legislature has vested in those sentenced to death a right to a proportionality review in the Virginia Supreme Court which compares the sentence in question to those imposed in similar cases. This right constitutes a life and liberty interest in the prescribed procedure to assure that the state properly distinguishes between those for whom the death penalty is appropriate and those for whom it is not. *Cf.* Spaziano v. Florida, 468 U.S. 447, 460 (1984)(this

Court has adopted certain guidelines designed to compel a state to "administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not"). To survive constitutional scrutiny, the state must have a "way" or system or method that meets "goals of measured, consistent application and fairness to the accused." Eddings v. Oklahoma, 455 U.S. 104, 111 (1982). The Virginia defendant sentenced to death has a state-created expectancy that the Supreme Court of Virginia will compare his case to all similar cases in Virginia to assure that his sentence is not disproportionate.

**B. The Virginia Supreme Court's Procedures Do Not Comply with the Life and Liberty Interests Accorded Petitioner by the Requirements of Virginia's Proportionality Review Statute.**

The Supreme Court of Virginia devoted but one paragraph to its proportionality review of Mr. Breard's death sentence. The Court initially correctly stated the test:

> The test we must apply in conducting the proportionality review is "whether *other sentencing bodies in this jurisdiction* generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant."

Breard v. Commonwealth, 445 S.E.2d 670, 682 (Va.1994), *cert. denied*, 513 U.S. 971 (1994) (citing Jenkins v. Commonwealth, 244 Va. 445, 462, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036 (1993)) (emphasis added). In the next sentence, the Court wrote:

> To guide us in applying the test, we have compiled and examined the records of all capital murder cases *reviewed by this Court*, including those in which a life sentence was imposed.

Id. at 682 (emphasis added). The denial of due process occurs because the set of "cases reviewed by this Court," that is those previously appealed to that court, does not equal the set of "capital murder cases decided by other sentencing bodies." The Virginia Supreme Court omits from its

review those cases not appealed to the court. Death cases are appealed directly to the Supreme Court, bypassing the intermediate state Court of Appeals. Life sentence cases, if appealed at all, go instead to the Court of Appeals with a follow up appeal to the Supreme Court by petition. Va. Code Ann. §§ 17-110.1(A); 17-116.05:1(A)(i); 17-116.08.

According to statistics in the Presentence Investigation Database maintained by the Virginia Criminal Sentencing Commission, an agency of the Commonwealth of Virginia (the "VCSC Database"), between January 1, 1985 and December 31, 1995, forty-three persons were charged with capital murder under § 18.2-31(5) of the Code of Virginia (murder in the commission of, or subsequent to, rape, sodomy, etc.) and convicted of some crime. Thirty-three of those individuals were convicted of capital murder in violation of § 18.2-31(5). Of the thirty-three convicted of capital murder, nineteen individuals (58%) were given a sentence other than death and fourteen individuals (42%) were given the death penalty. App. 136-37. Of the life sentence cases, only two were ultimately appealed to the Virginia Supreme Court.[17] Thus, the Supreme Court's pool of "similar" cases excludes the majority of all such convictions for the eleven year period -- seventeen out of thirty-three (51%) -- and, more to the point, excludes the vast majority of convictions in which a life sentence was imposed -- seventeen out of nineteen (89%). App. 304-05.

[17]The cases available for review by the Supreme Court of Virginia are listed in a compilation prepared by that court and a copy was included with Breard's petition as Exhibit 33. It lists two capital murder-rape cases in which life sentences were given during the 1985-1995 period; but only two, in stark contrast to the nineteen reported by the VCSC Database.

### C. The Virginia Supreme Court's Review of Petitioner's Case Denied Petitioner Due Process of Law.

Mr. Breard had a state-created right to a proportionality review that conformed to the dictates of the Virginia Code which requires the state supreme court to determine whether the sentence of death is "excessive or disproportionate to the penalty imposed *in similar cases*, considering both the crime and the defendant." Va. Code Ann. § 17-110.1(C)(2) (emphasis added). By limiting the pool to cases previously appealed to the Supreme Court, that court so skewed the pool that the required review was of no effect. While a proportionality review is not constitutionally required, Pulley v. Harris, 465 U.S. 37, 43 (1984), it is clear that federal procedural due process claims may be based on rights created by state statute. Evitts v. Lucey, 469 U.S. 387 (1985); Wolff v. McDonnell, 418 U.S. 539, 556-58 (1974); *accord* Harris v. Blodgett, 853 F. Supp. 1239, 1286 (W.D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995). The deprivation of Mr. Breard's right to a proportionality review conforming to the provisions of the state statute constitutes a cognizable due process claim because the statute created a protected life and liberty interest.

The District Court below determined that this claim that the Supreme Court's process denied petitioner his life and liberty interest without due process was not procedurally defaulted, but it

rejected the claim on its merits.[18] The Fourth Circuit, without comment, declined to review this claim, even when Mr. Breard repeated his complaint on a motion for rehearing. App. 80.

The effect of skewing the pool of cases to be reviewed is apparent. The Virginia Supreme Court, in twenty years of practice under the present death penalty statute, *has never reversed a death sentence because it was disproportionate*. The Virginia Supreme Court's procedures lead inexorably to this result.

An examination of cases in which a defendant was charged with capital murder under § 18.2-31(5) and convicted of a crime during the period 1985-1996 provides a glimpse at the universe of cases that should be considered by the Virginia Supreme Court in its proportionality reviews. A description of most of these cases in the VCSC Database was included in Mr. Breard's Petition, App.

---

[18]In its opinion, the District Court quoted from Breard's Brief on direct appeal in the Virginia Supreme Court to demonstrate the correctness of its holding that this claim had not been defaulted under the rule of Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975). Breard also preserved the claim by presenting it to the Virginia Supreme Court on habeas review. App. 82-89.

In considering the merits, the trial court relied upon Peterson v. Murray, 904 F.2d 882 (4th Cir.), *cert. denied*, 498 U.S. 992 (1990). Peterson, however, is distinguishable. There, the petitioner argued that the Virginia Supreme Court considered only cases in which the death penalty had been imposed and not any life sentence cases. The Virginia court had previously rejected that argument stating "we have examined the records in all capital-murder cases reviewed by this Court . . ." and the Fourth Circuit accepted that statement. Breard's claim is different as set forth in Section III.B., *supra*.

The Peterson court also stated that a federal court may not issue a writ of habeas corpus on the ground that the Virginia Supreme Court had made an error of state law, citing Shaw v. Martin, 733 F.2d 304, 317 (4th Cir.), *cert. denied*, 469 U.S. 873 (1984). Shaw, in turn, rejected a proportionality review claim citing Pulley v. Harris, 465 U.S. 37 (1984). The relevant portion of the Pulley v. Harris case, however, simply holds that the failure of California to require a "comparative proportionality review" cannot be successfully challenged under Furman v. Georgia, 408 U.S. 238 (1972). Furman, of course, concerned the Eighth Amendment's prohibition on cruel and unusual punishment. Breard does not base his proportionality review claim upon a violation of the Eighth Amendment; rather, he asserts that, once Virginia mandated a specific kind of proportionality review and thereby created a life and liberty interest, it could not fail to provide that specific review. *See* Harris v. Blodgett, 853 F. Supp. 1239, 1286 (W.D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995); *see also* Evitts v. Lucey, 469 U.S. 387 (1985); Hicks v. Oklahoma 447 U.S. 343 (1980).

Charts, App. 304-09.[19] Such an examination will also demonstrate that Virginia has not rationally distinguished between those for whom death is an appropriate sanction and those for whom it is not.

The charts of cases demonstrate that, in Virginia, the judge or jury does not "generally" impose the death penalty for a certain type of crime or criminal defendant. *Cf.* Jenkins v. Commonwealth, 244 Va. 445, 462, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036 (1993) ("On the question of disproportionality and excessiveness, we determine whether *other sentencing bodies in this jurisdiction generally impose* the supreme penalty for comparable or similar crimes, considering both the crime and the defendant") (emphasis added). Without minimizing the seriousness of Mr. Breard's crime, it is clear that many cases involving facts more vile than those in this case and defendants more dangerous than Mr. Breard have resulted in life sentences.

At this time, more than half of the states in the United States have proportionality review statutes or procedures that require an inquiry like that required in Virginia. *See* State v. Cobb, 234 Conn. 735, 754 n.18, 663 A.2d 948, 958 n.18 (1995) (cataloging state practices). The procedures under those statutes vary, as they might among the states, but numerous courts have struggled to determine how to perform the required review in a manner consistent with the requirements of the federal constitution. *See, e.g.*, State v. Bland, 958 S.W. 2d 651 (Tenn. 1997) (citing cases), *petition for cert. filed* (U.S. Feb. 23, 1998)(No. 97-8033); Cobb, *supra*; State v. Marshall, 130 N.J. 109, 125-140, 613 A.2d 1059, 1067-74 (1992), *cert. denied*, 507 U.S. 929 (1993); Banks v. Horn, 939 F. Supp. 1165, 1175 (M.D. Pa. 1996), *judgment vacated and remanded*, 126 F.3d 206 (3d Cir. 1997); Harris v. Blodgett, 853 F. Supp. at 1286-91. This case gives this Court an opportunity to provide

---

[19]The descriptions were obtained from newspaper articles and, without access to discovery, counsel for petitioner were unable to identify several cases.

guidance concerning the extent to which the Due Process Clause requires compliance with such statutes.

## CONCLUSION

Over 200 years ago, James Madison spoke for the American people when he wrote, "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit." The Federalist, No. 51 at 241 (Masters, Smith & Co. ed. 1852). For foreign nationals such as Breard, justice demands a fair trial with the assistance of his consul and a fair appeal. Virginia and other states have engaged in a long-term pattern of misconduct that has resulted in the denial of the Vienna Convention rights of numerous foreigners, to their severe detriment. As Judge Butzner observed below, if other nations follow the example of American states, the freedom and safety of Americans traveling abroad will be seriously threatened. Moreover, Virginia did not provide Mr. Breard with due process under its own statutory procedures governing appellate judicial proceedings in death penalty cases.

This Court should grant certiorari in this case and determine whether the states may be permitted to engage in the wholesale disregard of duties imposed by treaties entered into by the United States and, if not, how such violations are to be remedied. At the very least, a petitioner such as Breard should not be put to death where, but for Virginia's flagrant violation of his rights, he would have escaped that ultimate penalty. The Court should also grant certiorari to determine the due process ramifications of Virginia's disregard of the state-created life and liberty interests in the statutory mandates of its capital punishment procedure. With respect to the latter issue, Petitioner

submits that this Court should await its own decision on a related issue in Woodard v. Ohio Adult Parole Auth., __U.S.__, 118 S. Ct. 333 (1997), before deciding the due process question.

Respectfully submitted,

ANGEL FRANCISCO BREARD
By Counsel

Alexander H. Slaughter (VSB No. 05916)
William G. Broaddus (VSB No. 05284)
Dorothy C. Young (VSB No. 31155)
McGUIRE, WOODS, BATTLE & BOOTHE LLP
One James Center, 901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000

Michele J. Brace (VSB# 36748)
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-6845

**CERTIFICATE OF SERVICE**

I certify that three copies of the foregoing Petition for a Writ of Certiorari was hand delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, this 11th day of March, 1998.

No. 97-8214
A-___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

ANGEL FRANCISCO BREARD,

Petitioner

v.

FRED W. GREENE, WARDEN,

Respondent

Supreme Court, U.S.
FILED
MAR 19 1998
OFFICE OF THE CLERK

---

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

MARK L. EARLEY
ATTORNEY GENERAL OF VIRGINIA

*DONALD R. CURRY
SENIOR ASSISTANT ATTORNEY GENERAL
*Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
900 EAST MAIN STREET
RICHMOND, VIRGINIA 23219
(804) 786-4624

---

28 pp

## QUESTIONS PRESENTED

I. Where it is undisputed that petitioner murdered Ruth Dickie more than six years ago, should this Court grant a stay of execution to review a treaty-based claim that petitioner admits he never raised in state court and which both the court of appeals and the district court found barred by his procedural default?

II. Should this Court grant a stay to review a procedurally defaulted claim about the adequacy of the Virginia Supreme Court's "proportionality review" on direct appeal, especially where such a claim, even if it had been preserved, would fail to raise a cognizable federal issue?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF THE CASE | 1 |
| REASONS WHY THE WRIT AND A STAY SHOULD BE DENIED | |
| I. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A TREATY-BASED CLAIM THAT PETITIONER NEVER RAISED IN STATE COURT, WHICH BOTH LOWER COURTS RULED BARRED BY HIS PROCEDURAL DEFAULT, AND WHICH CLEARLY WOULD BE BARRED BY THE NEW RULE DOCTRINE EVEN IF IT WERE NOT DEFAULTED | 6 |
| A. Procedural Default | 6 |
| B. New Rule | 9 |
| C. No Individually Enforceable Rights | 10 |
| II. BREARD'S "PROPORTIONALITY REVIEW" CLAIM IS DEFAULTED AND FAILS TO RAISE A COGNIZABLE FEDERAL ISSUE | 11 |
| CONCLUSION | 12 |
| RESPONDENT'S APPENDIX | 13 |

## TABLE OF AUTHORITIES

Cases


**Page**

Bowersox v. Williams,
116 S.Ct. 1312 (1996) ..... 8

Breard v. Commonwealth,
248 Va. 68, 445 S.E.2d 670 (1994) ..... passim

Breard v. Netherland,
949 F. Supp. 1255 (E.D. Va. 1996) ..... 5

Breard v. Pruett,
134 Va. 615 (4th Cir. 1998) ..... 5,7,11

Breard v. Virginia,
513 U.S. 971 (1994) ..... 4

Coleman v. Thompson,
501 U.S. 722 (1991) ..... 6

Delo v. Stokes,
495 U.S. 320 (1990) ..... 8

Engle v. Issac,
456 U.S. 107 (1982) ..... 6,7

Foster v. Neilson,
27 U.S. (2 Pet.) 253 (1829) ..... 10

Gacy v. Welborn,
994 F.2d 305 (7th Cir.),
cert. denied, 510 U.S. 899 (1993) ..... 7

Gray v. Netherland,
116 S.Ct. 2074 (1996) ..... 6

In Re Irineo Tristan Montoya,
117 S.Ct. 2476 (1997) ..... 8

Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992) ..... 9

Lambrix v. Singletary,
117 S.Ct. 1517 (1997) ..... 9

McCleskey v. Zant,
467 U.S. 467 (1991) ..... 9

McQueen v. Sapp,
117 S.Ct. 2356 (1997) ..... 12

Michigan v. Long,
463 U.S. 1032 (1983) ..... 12

Murphy v. Netherland,
118 S.Ct. 26 (1997) ..... 8

O'Dell v. Netherland,
117 S.Ct. 1969 (1997) ..... 9

Ohio Adult Parole Authority v. Woodard,
cert. granted, 117 S.Ct. 2507 (1997) ..... 12

Reed v. Farley,
513 U.S. 339 (1994) ..... 10

Smith v. Murray,
477 U.S. 527 (1986) ..... 9

Sumner v. Mata,
449 U.S. 539 (1981) ..... 2, 3

Teague v. Lane,
489 U.S. 288 (1989) ..... 10

Wainwright v. Goode,
464 U.S. 78 (1984) ..... 12

Woratzeck v. Arizona Board of Clemency,
117 S.Ct. 2500 (1997) ..... 12

Statutes and Rules

28 U.S.C. § 2254(e)(1)..... 2,3

§ 8.01-654(B)(2), Code of Virginia..... 6

§ 19.1-163.7, Code of Virginia..... 4

§ 19.1-264.4, Code of Virginia..... 4

§ 53.1-232.1, Code of Virginia..... 5

U.S. Sup. Ct. Rule 10(a)..... 8

## STATEMENT OF THE CASE

It is undisputed that Breard sexually assaulted and murdered Ruth Dickie in her Arlington County apartment in February of 1992. The Virginia Supreme Court found as follows regarding the facts of the offense:

> In February 1992, the victim, Ruth Dickie, resided alone at 4410 North Fourth Road, Apartment 3, in Arlington County. She was 39 years of age and unmarried. Breard was living in an apartment a short distance from Dickie's apartment.
>
> About 10:00 or 10:15 p.m. on February 17, 1992, Dickie left an Arlington restaurant. About 10:30 or 10:45 p.m., Ann Isch, who lived in an apartment directly below Dickie's, heard Dickie and a man arguing loudly in the hall. Isch heard Dickie say, "[K]eep your hands off me." According to Isch, the arguing continued as she heard Dickie and the man enter Dickie's apartment. Almost immediately thereafter, when everything became quiet, Isch called the apartment complex maintenance man.
>
> Upon receiving Isch's call, the maintenance man, Joseph King, went to Dickie's apartment. King knocked on the apartment door and heard "something that sounded like something being drug across the floor." After receiving no response to his knocking, King called the police.
>
> When the police arrived, King gave them a master key. Upon entering the apartment, the police found Dickie lying on the floor. She was on her back, naked from the waist down, and her legs were spread wide. She was bleeding profusely and did not appear to be breathing.
>
> The police observed a "shiny...dried...body fluid" on Dickie's pubic hair and on her inner thigh. Hairs were found clutched in her bloodstained hands and on her left leg. Dickie's underpants had been torn from her body. The police found Dickie's eyeglasses, without one lens, in the living room, and the missing lens was found under her body. A telephone receiver located near her head was covered with blood. In the room where Dickie's body was found, the police also found her shoes and her pants with some buttons missing. Dickie's purse was on the floor just inside the front door, and her set of keys was on the floor between her legs.
>
> An autopsy revealed that Dickie had sustained five stab wounds to the neck. Two of the wounds would have caused her death.
>
> The body fluid found on Dickie's pubic hair and inner thigh was subjected to a serological examination and identified as semen. No semen was detected on vaginal or anal swabs.

> In the course of their investigation, the police obtained a sample of Breard's blood and samples of his head and pubic hair. The hair samples were subjected to microscopic examination, and the blood sample was subjected to enzyme testing and DNA analysis.
>
> The foreign hairs found on Dickie's body were determined to be identical in all microscopic characteristics to the hair samples taken from Breard. The hairs found clutched in Dickie's hand were Caucasian hairs "microscopically like" Dickie's own head hair and bore evidence that they had been pulled from her head by the roots. The semen found on Dickie's pubic hair matched Breard's enzyme typing in all respects. On all five of the genetic probes used in the DNA testing, Breard's DNA profile matched the DNA profile of the semen found on Dickie's body.
>
> Breard is a native of Argentina, and his DNA profile occurs in only one in seventeen million members of the Hispanic population. Only 1.7% of the general population has Breard's enzyme typing.
>
> At trial, Breard testified in his own defense. He stated that, on the night of February 17, 1992, he left his apartment armed with a knife because he thought he would "try to do someone," meaning that he "wanted to use the knife to force a woman to have sex with [him]." Breard admitted that he engaged Dickie in conversation on the street, followed her to her apartment, argued with her, and forced himself into her apartment. Breard also admitted that he stabbed Dickie, removed her pants, and got "on top of her." While he was on Dickie, he heard someone knocking on the door. He "got scared," opened a kitchen window, jumped to the ground, and fled. Breard also testified that, at the time, he believed that he was under a curse placed upon him by his ex-wife's father.

Breard v. Commonwealth, 248 Va. 68, 72-73, 445 S.E.2d 670, 673-674 (1994). See 28 U.S.C. § 2254(e)(1) (state court finding of fact must be presumed correct and petitioner may overcome presumption only by clear and convincing evidence); Sumner v. Mata, 449 U.S. 539, 541-549 (1981) (statutory presumption of correctness applies to state appellate court's recitation of historical facts).

With respect to the evidence warranting Breard's death penalty, the Virginia Supreme Court found as follows:

> In the penalty phase of the trial, the Commonwealth presented evidence that Breard had attacked two other women. Approximately three weeks before Breard murdered Dickie, he attacked Celia Gonzales on a street in Arlington County. He grabbed Gonzales from behind, ordered her to accompany him, and told her that he had

> a gun. Breard ultimately released Gonzales after he had been observed by a man sitting in a nearby parked car. Before leaving, Breard told Gonzales that he knew where she lived and that he "[had] someone who's going to get [her] later."
>
> On August 17, 1992, six months after Dickie's murder, Breard attempted to sexually assault Jeanine Yvonna Price. Breard and Price had met in Washington, D.C., and the two traveled, in Breard's automobile, to Breard's Arlington apartment.
>
> At the apartment, Breard began kissing Price "all over." Price resisted, but Breard pulled her to the floor, sat on her stomach, and started to remove her clothing. Eventually, he removed all of her clothing and started to remove his pants.
>
> Price began screaming for help, and Breard responded by hitting her in the face and ordering her to be quiet. Breard attempted to tie Price's hands with a telephone cord and told her that he intended to have anal intercourse with her.
>
> A man in a nearby apartment heard Price's screams and called the police. When the police arrived, they found Price, naked and hysterical, and Breard clad only in his undershorts. Breard was arrested and, at that time, became a suspect in Dickie's murder.

Breard, 248 Va. at 85, 445 S.E.2d at 680. See § 2254(e)(1); Sumner v. Mata.

Breard was arrested in August of 1992. There is no evidence that he was advised by the arresting authorities that he could contact the consulate of a foreign country; nor is there any evidence that he sought to make such contact. ***It is undisputed, however, that the state court promptly appointed two attorneys to represent Breard, that those attorneys represented Breard throughout the trial court proceedings and on direct appeal, and that they were free to contact whomever they saw fit.***

On June 24, 1993, after a 3½ day trial, a jury in the Circuit Court of Arlington County, Virginia, convicted Breard of capital murder and attempted rape of Ruth Dickie. The jury fixed Breard's punishment for the attempted rape at 10 years imprisonment and a fine of $100,000.

The trial court conducted a separate sentencing proceeding on June 24-25, 1993. After considering all the evidence in aggravation and mitigation, the jury sentenced Breard to death for the capital offense, finding that he represented a continuing serious threat to society ***and*** that his

offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. See Va. Code § 19.2-264.4.

The trial judge conducted yet another sentencing proceeding on September 9, 1993, at which the court considered additional evidence introduced on Breard's behalf. At the conclusion of that hearing, however, the court imposed final judgment in accordance with the jury's verdicts.

On appeal, Breard did not raise any claim alleging a violation of the Vienna Convention on Consular Relations ("Vienna Convention"). Breard's convictions and sentences were affirmed by the Supreme Court of Virginia on June 10, 1994. Breard v. Commonwealth, 248 Va. 68, 445 S.E.2d 670 (1994). This Court denied Breard's certiorari petition on October 31, 1994, thus marking the end of his direct appeal. Breard v. Virginia, 513 U.S. 971 (1994).

On October 24, 1994, the Circuit Court of Arlington County appointed counsel to represent Breard in his state habeas corpus proceedings. See Va. Code § 19.2-163.7. Breard filed his state petition on May 1, 1995. The petition raised no claim alleging a violation of the Vienna Convention. The Circuit Court dismissed the petition on June 29, 1995. Breard subsequently filed a motion to reconsider, which the state court denied on July 24, 1995.

Breard then filed a petition for appeal in the Virginia Supreme Court on September 28, 1995. On October 11, 1995, however, the Virginia Supreme Court granted Breard's request to file an amended petition for appeal, which he filed on October 30, 1995. Once again, Breard raised no claim that the Vienna Convention had been violated. The state court refused the amended petition for appeal on January 17, 1996. Breard's petition for rehearing was denied on March 1, 1996.

On March 19, 1996, the state trial court scheduled Breard's execution for May 2, 1996. On April 29, 1996, however, the United States District Court for the Eastern District of Virginia granted Breard's request for a stay of execution and on May 2, 1996, appointed ***five*** attorneys to represent Breard in his federal habeas proceedings. The district court initially directed Breard to file his federal petition on or before July 1, 1996. On June 19, 1996, however, the court extended

the filing deadline until August 30, 1996. Breard filed his petition on August 30. In that petition, Breard for the first time claimed that his conviction and sentence should be overturned because of an alleged violation of the Vienna Convention.

The district court heard oral argument on November 26, 1996. On November 27, the court dismissed Breard's petition, finding that most of his claims – including the "Vienna Convention" claim – were procedurally defaulted and barred from federal collateral review. Breard v. Netherland, 949 F. Supp. 1255, 1263-1269 (E.D. Va. 1996).

Breard appealed to the United States Court of Appeals for the Fourth Circuit, which heard oral argument on October 1, 1997. On January 22, 1998, the Court of Appeals affirmed the denial of federal habeas relief, specifically finding that Breard's "Vienna Convention" claim was barred by his procedural default. Breard v. Pruett, 134 F.3d 615, 618-620 (4th Cir. 1998). The Fourth Circuit denied Breard's petition for rehearing on February 18, 1998, with no judge requesting a poll on the suggestion for rehearing en banc.

Pursuant to Virginia Code § 53.1-232.1, the state trial court then scheduled Breard's execution for April 14, 1998. Breard has not yet asked the Fourth Circuit for a stay of execution.

## REASONS WHY THE WRIT AND A STAY SHOULD BE DENIED

### I. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A TREATY-BASED CLAIM THAT PETITIONER NEVER RAISED IN STATE COURT, WHICH BOTH LOWER COURTS RULED BARRED BY HIS PROCEDURAL DEFAULT, AND WHICH CLEARLY WOULD BE BARRED BY THE NEW RULE DOCTRINE EVEN IF IT WERE NOT DEFAULTED.

**A. Procedural Default:**

It is undisputed that Breard never raised his "Vienna Convention" claim in state court. His failure to raise the claim in state court bars federal collateral relief. See Gray v. Netherland, 116 S.Ct. 2074, 2080-2081 (1996). Breard already has litigated a state habeas petition and his claim undoubtedly now would be barred if he attempted to raise it in state court. See Va. Code §§ 8.01-654(B)(2) (prohibiting claims that could have been raised in a prior petition); 8.01-654.1 (limiting death row prisoners to one habeas petition). The "independent and adequate state ground doctrine" precludes federal collateral relief under such circumstances. See Coleman v. Thompson, 501 U.S. 722, 731-732 (1991), citing Engle v. Isaac, 456 U.S. 107, 125-126 n.28 (1982).

Breard's contention that the procedural default doctrine does not even apply to treaty-based claims (Ptn. 15-20) is precluded by Coleman which makes the doctrine applicable in "***all*** cases in which a state prisoner has defaulted his federal claims in state court." See 501 U.S. at 750 (emphasis added). It would make no sense, moreover, to hold, as this Court frequently has done, that claims based upon specific ***constitutional*** provisions may be defaulted, see, e.g., Gray v. Netherland, 116 S.Ct. at 2080-2081 (due process "Brady" claim barred by default), but that treaty-based claims may not. Indeed, the procedural default doctrine is now firmly established in our law, and Article 36(2) of the Vienna Convention expressly provides that the "rights" conferred by the treaty "shall be exercised in conformity with the laws and regulations of the

receiving State." (Resp. App. 2). Article 36(2)'s proviso that the law of the receiving state "must ***enable*** full effect to be given to the purpose [of the Article]" (emphasis added) is thus perfectly consistent with the default doctrine that generally "enables" a § 2254 prisoner to raise a claim if he raised it properly in state court.

In order to avoid his procedural default, Breard must show both "cause" and "prejudice." The Fourth Circuit applied these well-settled principles to the facts of Breard's case and concluded that he had not shown the required "cause" for his default.[1] See Breard, 134 F.3d at 620. The Court of Appeals' opinion listed the cases that existed when Breard filed his state habeas petition in May of 1995 which would have provided support for a claim that he was entitled to relief due to the State's alleged failure to notify him of his right to consular assistance pursuant to the Vienna Convention. Id. Because the "tools" to construct his claims were available at a time when the claims could have been raised in state court, Breard clearly cannot show "cause" for his default. See Engle, 456 U.S. at 133 ("we cannot say that respondents lacked the tools to construct their constitutional claim").

Breard's assertion of "novelty" as "cause" (Ptn. 20-21) cannot possibly get him anywhere because, in light of the "new rule" doctrine (see Argument B, below), an invocation of "novelty" does nothing other than "plead the petitioner out of court." See Gacy v. Welborn, 994 F.2d 305, 311 (7th Cir.), cert. denied, 510 U.S. 899 (1993). ***The assertion of "novelty" also is belied by the fact that, when he raised his "Vienna Convention" claim in the district court, Breard alleged that his trial and state habeas attorneys had been ineffective in failing to raise the claim.*** (Ptn. App. 158-160). Obviously, Breard's ineffective counsel allegation implicitly

---

[1] The Court of Appeals also correctly concluded that, in view of Breard's undisputed guilt and eligibility for a death sentence under Virginia law, his case clearly does not fall within the "miscarriage of justice" exception to the default doctrine. Breard, 134 F.3d at 620.

acknowledged that prior counsel had the legal and factual means to have raised the claim. Breard now expediently argues exactly the opposite. (Ptn. 21).

The Fourth Circuit's routine analysis of Breard's defaulted claim – which never was raised in state court – certainly does not warrant this Court's review. See generally U.S.S.Ct. Rule 10 ("certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law"). This Court, moreover, recently has denied petitions and requests for stays of execution in cases where Virginia and Texas prisoners were attempting to litigate defaulted "Vienna Convention" claims. See Murphy v. Netherland, 118 S.Ct. 26 (1997) (stay and certiorari denied); [2] In Re Irineo Tristan Montoya, 117 S.Ct. 2476 (1997) (stay and habeas petition denied). The Court should do the same here. See generally Bowersox v. Williams, 116 S.Ct. 1312 (1996) (defaulted claims not raised in prior petition cannot justify a stay); Delo v. Stokes, 495 U.S. 320

[2] Indeed, Murphy's "Questions Presented" regarding the "Vienna Convention" claim were substantially the same as Breard's. (Resp. App. 3-4).

(1990) (same); see also McCleskey v. Zant, 467 U.S. 467, 490 (1991) (equating principles of procedural default and abuse of writ).[3]

**B. New Rule:**

No court in this country ever has held that an alleged violation of the Vienna Convention may serve as a basis for overturning a state prisoner's conviction or sentence. Announcing such a novel, far-reaching rule in this federal collateral proceeding, therefore, would be barred by the "new rule" doctrine even if Breard's claim were not defaulted. See generally O'Dell v. Netherland, 117 S.Ct. 1969, 1973 (1997) (federal collateral relief is precluded "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court"); Lambrix v. Singletary, 117 S.Ct. 1517, 1525 (1997) ("our first and principal task is...to determine... whether...the unlawfulness

[3] Breard suggests that a "Vienna Convention" violation constitutes a "structural error" which is immune from a "prejudice" analysis. (Ptn. 22). This suggestion, however, mistakenly confuses "harmless error" analysis with "prejudice" under the "cause and prejudice" standard. When a claim such as Breard's is so clearly defaulted because he never raised it in state court, it is ***his*** burden to prove "prejudice," and even the "prejudice" inquiry is superfluous in the absence of a showing of "cause." See Smith v. Murray, 477 U.S. 527, 533 (1986). Even if Breard could show "cause," he cannot sustain his burden of showing "prejudice" because none of the facts upon which he bases his allegation ever was presented to the state courts. See Keeney v. Tamayo-Reyes, 504 U.S. 1, 11-13 (1992); § 2254(e)(2). Moreover, his trial counsel's affidavit that was made a part of the record during the state habeas proceedings clearly shows that counsel had no difficulty obtaining and presenting mitigating evidence related to Breard's background in South America. (Ptn. App. 195-197, 201). Breard's speculation about whether his trial counsel ultimately could have secured a plea agreement ***if*** Breard had been willing to plead guilty is too tenuous to support an affirmative showing of "prejudice." The undisputed facts are that Breard's trial attorneys urged him to plead guilty, and Breard adamantly refused to do so and insisted upon a jury trial. (Ptn. App. 195, 201, 202.01-202.02).

of Lambrix's conviction was apparent to all reasonable jurists" at the time the conviction became final); Teague v. Lane, 489 U.S. 288 (1989).[4]

**C. No Individually Enforceable Rights:**

The preamble to the Vienna Convention specifically states that the signing nations "have agreed" to the Convention "[r]ealizing that the purpose of such privileges and immunities ***is not to benefit individuals*** but to ensure the efficient performance of functions by consular posts on behalf of their respective states." (Resp. App. 1, emphasis added). Notably absent from the Vienna Convention is any prescribed mechanism, judicial or otherwise, for the enforcement of individual rights.

Given that the Vienna Convention expressly was not intended to "benefit individuals," it simply cannot be concluded that the "rights" afforded under the Vienna Convention are individual rights, enforceable by a state prisoner in a federal habeas proceeding under § 2254. Instead, an alleged failure to comply with the treaty is an issue that properly may be addressed only by the executive branch of the federal government through negotiations with a signatory nation. Even then, however, such negotiations could not mandate relief for a state prisoner from a valid conviction or sentence.

---

[4] A claimed treaty violation such as Breard's would be incapable of supporting federal collateral relief, even if there were no "new rule" doctrine. See Reed v. Farley, 513 U.S. 339, 348 (1994) (opinion of Ginsburg, J.) (mere violation of federal statute may support § 2254 relief only if it qualifies as a "fundamental defect which inherently results in a complete miscarriage of justice"); id. at 359 (Scalia, J., concurring) (mere violation of federal statute incapable of supporting § 2254 relief, so long as "full and fair opportunity" to raise claim in state court); see also Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (treaty must "be regarded . . . as equivalent to an Act of the Legislature"). Whatever else one might think about Breard's "Vienna Convention" claim, it certainly does not constitute a "fundamental defect" or a "complete miscarriage of justice," and he and his prior attorneys clearly had a full and fair opportunity to raise the claim in state court.

## II. BREARD'S "PROPORTIONALITY REVIEW" CLAIM IS DEFAULTED AND FAILS TO RAISE A COGNIZABLE FEDERAL ISSUE.

Petitioner simply is wrong when he asserts that the Fourth Circuit "declined" to address his "proportionality review" claim. (Ptn. 27). The Court of Appeals addressed the claim, but expressly held that the claim was defaulted because it was raised on direct appeal "only as a state law claim" and because the Virginia Supreme Court expressly applied its default rule when Breard first attempted to "federalize" the claim during the state habeas proceedings.[5] Breard, 134 F.3d at 621. The Fourth Circuit went on to hold that Breard had failed to establish "cause" for the default and that no "miscarriage of justice" would result from a failure to reach the merits of the claim. Id.

Even if Breard's claim were not defaulted, however, it hardly would warrant the granting of certiorari or a stay of execution. Breard argues that, in conducting its review on direct appeal, the Virginia Supreme Court failed to adhere to what Breard says are the requirements of Virginia Code § 17-110.1. (Ptn. 26). The fact of the matter, however, is that on direct appeal the Virginia Supreme Court expressly stated that it had conducted the proportionality review required by the state statute and concluded "that Breard's death sentence is not excessive or disproportionate." See Breard, 248 Va. at 89, 445 S.E.2d at 682.

---

[5] Breard thus is wrong when he asserts that the Court of Appeals' denial of his rehearing petition somehow supports the conclusion that the court below failed to address his claim. (Ptn. 27). In view of the express holding in the Fourth Circuit's published opinion, the summary denial of rehearing must be read as a rejection of Breard's contention that the panel had ignored his claim.

It is elementary that the Virginia Supreme Court is the final arbiter of the requirements of state law. See Wainwright v. Goode, 464 U.S. 78, 84 (1984). This Court clearly does not have jurisdiction to grant certiorari to review matters of state law.[6] See Michigan v. Long, 463 U.S. 1032, 1038 (1983).

Finally, it is nothing short of folly for Breard to suggest that his death sentence is in any sense "disproportionate" to the indescribable violence which he inflicted upon Ruth Dickie. Thus, even if proportionality review were a matter of constitutional concern, Breard's death sentence undoubtedly would stand.

## CONCLUSION

The petition for a writ of certiorari and the motion for a stay of execution should be denied.

Respectfully submitted,

FRED W. GREENE, WARDEN

By: _____
Counsel

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

---

[6] Breard's suggestion that this Court should hold his certiorari petition, pending this Court's decision in Ohio Adult Parole Authority v. Woodard, cert. granted, 117 S.Ct. 2507 (1997), is frivolous. (Ptn. 30). Unlike Breard's claim, the "due process" claim at issue in Woodard is not defaulted. Moreover, in Woodard, this Court granted the State's certiorari petition to review a aberrant court of appeals' decision that found a "due process" interest in the clemency process where no such interest previously had been recognized. This Court repeatedly has rejected death row prisoners' attempts to obtain stays of execution pending the outcome of Woodard. See, e.g., McQueen v. Sapp, 117 S.Ct. 2536 (1997); Woratzeck v. Arizona Board of Clemency, 117 S.Ct. 2500 (1997). Breard's passing reference to Woodard does not even begin to suggest how a clemency due process issue could affect a defaulted proportionality issue.

RESPONDENT'S APPENDIX

UNITED NATIONS CONFERENCE
ON CONSULAR RELATIONS

---

# VIENNA CONVENTION
# ON
# CONSULAR RELATIONS

*UNITED NATIONS*
1964

RESP. APP. 1

TIAS 6820

BEST AVA

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations [1] concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961, [2]

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

---

[1] TS 993; 59 Stat. 1031.
[2] 500 UNTS 95.



AILABLE COPY

sending State, a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers ad hoc. In such cases the provisions of paragraph 5 of this Article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

RESP. APP. 2

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARIO B. MURPHY,
*Petitioner-Appellant,*

v.

J. D. NETHERLAND, WARDEN,
MECKLENBURG CORRECTIONAL CENTER,
*Respondent-Appellee.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

# PETITION FOR A WRIT OF CERTIORARI

**Imminent Execution Scheduled**
**September 17, 1997**

Robert F. Brooks
*(Counsel of Record)*
William H. Wright, Jr.
William G. Kanellis
HUNTON & WILLIAMS
Riverfront Plaza - East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-8455 or (804) 788-8209

Michele J. Brace
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
PO Box 506
Richmond, VA 23204-0506
(804) 643-6845

*Counsel for Petitioner*
*Mario B. Murphy*

## QUESTIONS PRESENTED
## (CAPITAL CASE)

1. (a) Does new 28 U.S.C. § 2253(c)(2), which authorizes issuance of a certificate of appealability to a habeas corpus petitioner only if he makes a substantial showing of the denial of a ***constitutional*** right, effectively divest federal courts of jurisdiction to consider a habeas petitioner's appeal based on the violation of a ***treaty***? (b) If yes, does § 2253(c)(2) violate due process or equal protection by enabling respondents — but not petitioners — to appeal the district court's adjudication of a claim based on the violation of a treaty of the United States?

2. Does Article 36(2) of the Vienna Convention on Consular Relations, which mandates that the internal laws and regulations of the United States must enable full effect to be given to the treaty's intended purposes, supervene the domestic doctrine of procedural default for habeas claims based on the violation of a right conferred by the Convention?

3. Is the failure to notify an arrested foreign national of his treaty-based right to communicate with and receive assistance from his consulate a structural error?

4. Does the doctrine of "reasonable unavailability," which provides cause to excuse a procedural default when the factual or legal basis of the claim was reasonably unavailable, excuse a default when the legal basis for the claim was contained in a treaty which was ratified by the United States in 1969, but which was so far removed from the mainstream of criminal defense law that its existence was not recognized in any criminal law treatise, published criminal law opinion, or other relevant authority until 1996?

No. 97-8214

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

SUPREME COURT, U.S.
FILED
1998
OFFICE OF THE CLERK

ANGEL FRANCISCO BREARD,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

# PETITIONER'S BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Imminent Execution Scheduled
April 14, 1998

Alexander H. Slaughter (VSB#05916)
Counsel of Record
William G. Broaddus (VSB#05284)
Dorothy C. Young (VSB#31155)
McGuire, Woods, Battle & Boothe LLP
One James Center, 901 E. Cary Street
Richmond, VA 23219
(804) 775-1085

Michele J. Brace (VSB No. 36748)
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-8439

Counsel to Angel Francisco Breard

Petitioner Angel Francisco Breard responds as follows to the Brief of the United States as Amicus Curiae:

1. 28 U.S.C. § 2254(a) makes collateral relief available to state prisoners who are in custody in "violation of the Constitution or laws or treaties of the United States." The Court's authority to grant collateral relief to Breard springs from Section 2254(a), not from the Vienna Convention. Therefore, the alleged lack of a remedy within the treaty itself is irrelevant to Breard's case.

2. The reason that Breard's claim based on violation of the Vienna Convention was not raised in a timely fashion is that the Commonwealth of Virginia, which had the obligation to notify Breard of his right to consular notification, did not do so in a timely fashion. It is unseemly, if not unconscionable, to make Breard bear the consequence (in this case the forfeiture of his life) of the state's dilatoriness. Reduced to its essence, the United States says that a criminal defendant or habeas petitioner must present a claim based on a failure of consular notification *before* he has been made aware of the existence of his right to consular notification. Merely to state this proposition is to illustrate its illogic. However appropriate the United States' position may be for the small number of detainees who have independent knowledge of their rights under Article 36(1) and can assert them in a timely manner, that position is irrational and unreasonable for most foreign nationals because they are in no position to protest the failure of consular notification until the receiving state informs them that a right to notification exists in the first place. For detainees like Breard, who were never notified of their right to consular notification (or who were notified only after it was too late to raise a timely claim under state law), the common-law rule of procedural bar does not "enable full effect to be given to the purpose for which the rights accorded under [Article 36(1)] are intended."

The United States misses the mark when it cites this Court's application of its procedural default jurisprudence to habeas corpus claims based on alleged violations of the United States Constitution. Congress could, if it chose, enact legislation providing that federal constitutional claims cannot be procedurally barred in habeas proceedings. It has not done so. The Vienna Convention, however, contains an express shield against the operation of procedural default when that domestic law impairs full effect from being given to specific provisions within the treaty, including the right to consular notification. The shield was part of the treaty to which the Senate consented, that the President ratified, and that is now the law of the land.

3. Citing Smith v. Murray, 477. U.S. 527 (1986), the United States suggests that the unavailability of a legal claim does not provide cause for a procedural default unless the legal basis for the claim was impossible to discover. The better interpretation of the "unavailability" exception to procedural default is contained in Reed v. Ross, 468 U.S. 1 (1984), and Coleman v. Thompson, 501 U.S. 722. Those cases require only "reasonable unavailability," meaning that compliance with the state procedural rule was "impracticable." Id. at 753.

4. The United States' "new rule" argument is the same as that raised by the habeas respondent. Even the lower court's most ardent scholars of the "new rule" jurisprudence did not find this argument persuasive, and neither should this Court. A treaty which has been the law of the land for more than a quarter of a century, which has been routinely complied with by federal law enforcement officials, and which has mandated consular notification for all detained foreign nationals from signatory countries is simply not a "new rule."

The consular notification provision was unavailable to Breard because of its obscurity, not because of its actual novelty. It was buried in a small number of legal authorities that explained or analyzed diplomatic or immigration law. Breard had no diplomatic status, and his immigration problems, if any, were not the proper concern of the lawyers appointed to defend him on charges of capital murder.[1]

## CONCLUSION

For the reasons stated above, Petitioner Angel Francisco Breard respectfully requests that his Application for a Stay of Execution be granted.

Respectfully submitted,

ANGEL FRANCISCO BREARD

By Counsel

Alexander H. Slaughter (VSB#05916)
William G. Broaddus (VSB#05284)
Dorothy C. Young (VSB#31155)
MCGUIRE, WOODS, BATTLE & BOOTHE LLP
One James Center, 901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000

Michele J. Brace (VSB# 36748)
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-8439

[1] If Breard's defense counsel had asked the state court for permission to incur the cost of researching diplomatic and immigration law, based on nothing more than speculative hope that they might find something to assist their client because he was a foreign national, there is no doubt that the state court would have denied the request.

## CERTIFICATE

I certify that a copy of the foregoing was faxed and hand-delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, and faxed to Seth P. Waxman, Esquire, Solicitor General of the United States, Office of the Solicitor General, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 on April ___, 1998.

**ORIGINAL**

Supreme Court, U.S.
FILED
MAR 24 1998
CLERK

No. 97-8214

**IN THE SUPREME COURT**
**OF THE UNITED STATES**
**October 1997 Term**

---

**ANGEL FRANCISCO BREARD,**

*Petitioner,*

**v.**

**FRED W. GREENE, WARDEN,**

*Respondent.*

---

**On Petition for a Writ of Certiorari to the**
**United States Court of Appeals for the Fourth Circuit**

---

# PETITIONER'S REPLY BRIEF

**Imminent Execution Scheduled**
**April 14, 1998**

---

**Alexander H. Slaughter (VSB#05916)**
**(Counsel of Record)**
**William G. Broaddus (VSB#05284)**
**Dorothy C. Young (VSB#31155)**
**McGuire, Woods, Battle & Boothe LLP**
**One James Center, 901 East Cary Street**
**Richmond, Virginia 23219**
**(804) 775-1000**

**Michele J. Brace (VSB# 36748)**
**Virginia Capital Representation**
**Resource Center**
**1001 East Main Street, Suite 510**
**Richmond, Virginia 23219**
**(804) 643-6845**

**Counsel for Petitioner**
**Angel Francisco Breard**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . i

REASONS FOR GRANTING THE WRIT . . . . . 1

1. The Vienna Convention Claim Is an Important Issue of Federal Law . . . . . 1

2. The Language of Article 36 Creates a Specific Rule Overcoming the General Rule of Default. . . . . 2

3. The Vienna Convention Rule Was Novel Prior to 1996 . . . . . 3

4. Enforcement of Vienna Convention Rights Will Not Constitute a New Rule . . . . . 4

5. The Convention's Lack of a Specific Remedy Mechanism Should Not Deter this Court from Enforcing Rights Thereunder . . . . . 5

6. Breard's Proportionality Review Claim Was Not Defaulted . . . . . 5

7. Breard's Proportionality Claim Rests on Due Process Considerations Which Are the Province and Responsibility of this Court . . . . . 7

CONCLUSION . . . . . 7

CERTIFICATE OF SERVICE . . . . . 8

## TABLE OF AUTHORITIES

### CASES


Amadeo v. Zant, 486 U.S. 214 (1988) . . . . . 3

Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996) . . . . . 3

Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998) . . . . . 1, 3

Coleman v. Thompson, 501 U.S. 722 (1991) . . . . . 3

Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996) . . . . . 1

Furman v. Georgia, 408 U.S. 238 (1972) . . . . . 5

Lambrix v. Singletary, __U.S.__, 117 S. Ct. 1517 (1997) . . . . . 5

Murray v. Carrier, 477 U.S. 478 (1986) . . . . . 3

Reed v. Farley, 512 U.S. 339 (1994) . . . . . 1

Teague v. Lane, 489 U.S. 288 (1989) . . . . . 4

Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178 (6th Cir.), *cert. granted*, __U.S.__, 117 S. Ct. 2507 (1997) . . . . . 7


### MISCELLANEOUS


United States Department of State, 7 Foreign Affairs Manual 411.1 (1984) . . . . . 1

Lee Hockstader, Jailing of 6 Americans by Serbia Condemned, Wash. Post, Mar. 22, 1998 . . . . . 2

Angel Francisco Breard, pursuant to Rule 15(6), Rules of the Supreme Court of the United States, files this Reply Brief in response to Respondent's Brief in Opposition in order to address points raised in the Brief in Opposition.

## REASONS FOR GRANTING THE WRIT

-1-

### The Vienna Convention Claim Is an Important Issue of Federal Law

Respondent seeks to avoid dealing with the Vienna Convention by contending that the "rights" afforded by it are not individual rights enforceable by a state prisoner in a federal habeas proceeding. Respondent's position is contrary: (1) to the language of Article 36 of the Vienna Convention ("the said authorities shall inform the person concerned without delay of his rights . . . ."); (2) to the position of the United States Department of State (Article 36 of the Vienna Consular Convention provides that "the host government must notify the arrestee without delay of the arrestee's right to communicate with the American Consul," United States Department of State, 7 Foreign Affairs Manual 411.1 (1984); App. 280), and (3) to case law (Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (Vienna Convention "provides rights to individuals rather than merely setting out the obligations of signatories"), and Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) (Vienna Convention requires arresting government to notify foreign national "of his right to contact his consul")). Rather than demonstrate that Breard's Petition lacks merit, Respondent has left no doubt that Breard has raised questions of federal law which have not been, but should be, settled by this Court. Rule 10, Rules of the Supreme Court of the United States.

Respondent's citation to Reed v. Farley, 512 U.S. 339 (1994) is inapposite because Breard has not claimed merely a violation of a treaty or federal statute. Rather, Breard contended below that

the violation of his Article 36 rights under the Convention gave rise to claims under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *See* Petition in the District Court, ¶ 49, App. 122.

The importance of the Vienna Convention, which even Respondent does not dispute, has been illustrated within the last week. Six private American citizens were arrested and jailed in Serbia on March 21, 1998. Lee Hockstader, Jailing of 6 Americans by Serbia Condemned, Wash. Post, Mar. 22, 1998 at A29 (copy attached as Exhibit 1). The Post article pointed out that "efforts by American diplomats to visit the six were unavailing." *Id.* Accordingly, while the Post does not disclose whether the arrested Americans had been notified of their right to consult with American diplomats, it makes clear that their right to consular access, likewise guaranteed by the Convention, was being denied. The Serb rejoinder to the protest of this behavior by the United States could well be that since "neither your states nor your courts observe the Convention, why should we."



**The Language of Article 36 Creates a Specific Rule Overcoming the General Rule of Default.**

Breard does not dispute the general proposition that treaty rights, like constitutional rights, may be defaulted. However, Article 36(2) of the Vienna Convention, which precludes local law from interfering with the implementation of its terms, requires more precise analysis than Respondent would wish. One could imagine a situation where a foreign national knowingly refused to raise the failure of the authorities to comply with the Convention. But these circumstances do not exist here. The Commonwealth of Virginia, in its wilful failure to comply with its duty under the Convention, kept Breard ignorant of his rights. Although he eventually gained access to consular

assistance, he was by then convicted, condemned and, according to Respondent, defaulted. Article 36(2) was deliberately drafted to prevent such injustice from occurring in the name of "local law." The default doctrine and Coleman v. Thompson, 501 U.S. 722, 750 (1991), relied upon by Respondent, therefore, simply do not apply.



**The Vienna Convention Rule Was Novel Prior to 1996**

Respondent's contention that Breard's Vienna Convention claim was not novel prior to 1996 is premised upon Respondent's misunderstanding of the standard previously established by this Court for determining novelty as a cause for avoiding default. Respondent, like the Court of Appeals, implies that novelty is available only where discovery of a claim is *impossible*. This Court has made clear, however, that novelty, as cause for avoiding default, is available where the "basis for a claim was *not reasonably* available to counsel . . . 'or some interference by officials' . . . made compliance *impracticable* . . . ." Coleman v. Thompson, 501 U.S. at 753 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986). *See also* Amadeo v. Zant, 486 U.S. 214, 221-22 (1988). Certainly, there is no basis for concluding, as the Court of Appeals did, that the legal basis for Breard's claim was reasonably available to counsel merely because of the existence of one unpublished habeas corpus opinion on Lexis and four published deportation case opinions, one of which does not mention the Convention, and three of which, while mentioning the Convention, do not have any criminal law head notes. *See* Footnotes 14 and 15 on page 21 of Breard's Petition for a Writ of Certiorari. Moreover, "Virginia's persistent refusal to abide by the Vienna Convention . . .", Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996), *aff'd sub nom,* Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998) is the type of

interference by officials which made impracticable Breard's assertion of a right under the Convention.

Respondent attempts to undercut the novelty argument by noting that Breard had contended below that his trial counsel were ineffective in failing to raise the claim, however. Breard asserted that claim only in the alternative ("if this court finds that trial counsel should have been aware of the existence of the Convention, which is denied, Petitioner submits . . . ." Petition in the District Court, ¶ 133, App. 158). Such alternative pleading is not an admission that the Vienna Convention claim was known or reasonably should have been known prior to 1996.

Respondent's claim that Breard has speculated "about whether his trial counsel . . . could have secured a plea agreement *if* Breard had been willing to plead . . . " cravenly misrepresents its own conduct in attempting to defeat Breard's claim. It procured and introduced in state habeas proceedings an affidavit by Breard's trial counsel that "the prosecutor . . . had made it clear to us that the Commonwealth would forego the death penalty if Breard would plead guilty." Affidavit, ¶ 5, App. 195. Thus, there can be no doubt that cause and prejudice exist.

-4-

**Enforcement of Vienna Convention Rights Will Not Constitute a New Rule**

Respondent's "new rule" argument was not embraced by either court below. Novelty, which provides cause for avoiding a procedural default, does not automatically result in the establishment of a new rule. Article 36 of the Vienna Convention does not impose a new rule, because it neither "breaks new ground" nor "imposes a new obligation on the States or the Federal Government." Teague v. Lane, 489 U.S. 288, 301 (1989). Although the Vienna Convention argument was novel

because it was not reasonably available to Breard until 1996, the Convention has imposed a binding obligation upon the states (of which the U.S. State Department made them aware) for over a quarter of a century. Surely, if "reasonable jurists" had been presented with and addressed the merits of Breard's Vienna Convention claim at the time of his direct appeal, they would have acknowledged the unlawfulness of his conviction. Lambrix v. Singletary, __U.S.__, 117 S. Ct. 1517, 1525 (1997).

-5-

**The Convention's Lack of a Specific Remedy Mechanism Should Not Deter this Court from Enforcing Rights Thereunder**

Respondent would have this Court ignore fifty years of constitutional law development and close the nation's collective eyes to the state's repeated violations of Article 36 because the Convention does not contain a specific mechanism to remedy violations. No provision of the Bill of Rights or the Fourteenth Amendment provides a specific mechanism to remedy violations of citizens' rights under those guarantees. This Court would have made a mockery of those precious rights if it had followed the course in respect to them which Respondent here proposes. The remedy here is to grant a new trial.

-6-

**Breard's Proportionality Review Claim Was Not Defaulted**

In the Court of Appeals, Breard asserted four claims in support of his contention that the state's sentence violated federal due process and Furman v. Georgia, 408 U.S. 238 (1972), and its progeny:

1. The prosecutor's decision to seek the death penalty was arbitrary,

2. In Virginia, the death penalty is arbitrarily imposed in capital murder-rape cases,

3. Breard's death penalty was disproportionate to the penalty imposed in similar cases, and

4. The Supreme Court of Virginia's mandatory review was constitutionally defective.

Arguments 1, 2 and 3 were styled Claims III A, III B and III C by the District Court, *see* App. 25-26, and dismissed as defaulted. The District Court did find that the facts supporting No. 3 (III C) had been presented to the state court but without reference to either state or federal law. The Court of Appeals affirmed each of these holdings. App. 9.

With respect to Claim No. 4 (Claim IV in the District Court), the District Court specifically held that the claim had not been defaulted. App. 29-30. That court quoted the following language from Breard's brief on direct appeal to the Virginia Supreme Court to demonstrate the lack of default:

> [A] defendant's liberty interest in proportionality review is violated by the consideration of only those cases which are reviewed by the Virginia Supreme Court. Thus, the Court does not consider those cases in which the death penalty was not imposed, which prevents the Court from reviewing the types of cases in which death was not the appropriate sentence.
>
> For these reasons, the proportionality review conducted by the Court constitutes a violation of the Defendant's due process rights under the Fourteenth Amendment.

App. 29. The District Court erroneously rejected the claim on the merits, however, by equating it to a state law issue. App. 30; *see* Breard's Petition for Writ of Certiorari at 27 n.18.

The Court of Appeals did not deal with the claim at all. App. 09. Respondent's statement to the contrary is wrong and cannot be supported.

**Breard's Proportionality Claim Rests on Due Process Considerations Which Are the Province and Responsibility of this Court**

Breard's claim that the Virginia Supreme Court violated his life and liberty interest in a state-created right is premised on the Due Process Clause of the Fourteenth Amendment.

Respondent's only response is that this claim is a state issue. Again, Respondent is wrong. The protection of rights guaranteed by the Due Process Clause of the Fourteenth Amendment is ultimately the responsibility of this Court, not state courts. Moreover, whatever deference the Virginia Supreme Court might otherwise be entitled to receive on this issue was lost when that court refused to consider the claim on the merits. *See* App. 29-30.

This Court is considering a similar challenge to state criminal procedures under the Due Process Clause in Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178 (6th Cir.), *cert. granted*, __U.S.__, 117 S. Ct. 2507 (1997). This Court should either grant certiorari in this case as well, or stay this case pending the decision in Woodard.

**CONCLUSION**

Breard has raised an important federal law claim concerning the Vienna Convention which this Court has not addressed, but which requires resolution for the benefit of lower courts. Breard has also raised an important federal law claim involving the analysis of the denial of due process when a state deprives a defendant of a state-created life and liberty interest.

This case presents those issues clearly and cleanly. For those reasons, Breard requests that this Court issue a writ of certiorari to review this case and grant his forthcoming application for a

stay of execution pending appeal. Such an application has been filed in the Court of Appeals for the Fourth Circuit, and will be lodged or filed in this Court later this week.

Respectfully submitted,

ANGEL FRANCISCO BREARD
By Counsel

Alexander H. Slaughter

Alexander H. Slaughter (VSB No. 05916)
William G. Broaddus (VSB No. 05284)
Dorothy C. Young (VSB No. 31155)
McGUIRE, WOODS, BATTLE & BOOTHE LLP
One James Center, 901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000

Michele J. Brace (VSB# 36748)
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-6845

**CERTIFICATE OF SERVICE**

I certify that three copies of the foregoing Petitioner's Reply Brief were hand delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, this 24th day of March, 1998.

Alexander H. Slaughter

Citation
3/22/98 WASHPOST A29
3/22/98 Wash. Post A29
1998 WL 2474645

Search Result

Rank 1 of 1

Database
WP

The Washington Post
Copyright 1998, The Washington Post Co. All Rights Reserved

Sunday, March 22, 1998

A Section

# Jailing of 6 Americans By Serbia Condemned; U.S. Decries Growing 'Pattern' of Harassment

Lee Hockstader
Washington Post Foreign Service

Six Americans were in jail here tonight in what outraged U.S. diplomats called a case of official anti-American harassment masquerading as a garden-variety technical offense.

Most of the six, who were sentenced to 10-day jail terms for not reporting their presence to local police, are members of a San Francisco-based group called Peace Workers. They had spent at least several days in Kosovo, the volatile southern province of Serbia, Yugoslavia's dominant republic, instructing local ethnic Albanian activists on nonviolent conflict resolution before being arrested late Friday and today, according to U.S. sources.

In another episode involving Americans in the region today, Yugoslav authorities refused to grant visas to 14 members of a bipartisan delegation, including Rep. Jim Moran, a Northern Virginia Democrat, two other congressmen and Ed Turner, CNN editor at large.

The group was attempting to enter the country from neighboring Macedonia to call attention to what it called, in a press release, "the recent reign of terror inflicted on the people of Kosovo" by the regime of Yugoslav President Slobodan Milosevic. Its visit would have coincided with Sunday's elections for president and parliament of Kosovo, an event the Serbian government regards as illegal.

Kosovo, a poor province of Serbia, has a population that is 90 percent ethnic Albanian but is dominated politically by ethnic Serbs. The two communities live so separately -- and unequally -- that the arrangement has been compared to apartheid.

U.S. diplomats in Belgrade were protesting both incidents and trying to arrange for an early release for the Peace Workers volunteers.

EXHIBIT
1

Copr. © West 1998 No Claim to Orig. U.S. Govt. Works

3/22/98 WASHPOST A29

"There is a developing pattern of clear harassment of Americans," said Robert S. Gelbard, President Clinton's senior representative for U.S. policy on the Balkans. "What they're showing, of course, is gross stupidity. . . . It is likely to produce a harder U.S. attitude" not only within the administration but on Capitol Hill as well.

The arrests and visa denials come amid what appears to be a rising tide of anti-Americanism here in recent days, following a bloody police crackdown in Kosovo in the last three weeks.

More than 80 people died in the crackdown, and Washington vowed to impose further economic sanctions on Belgrade.

The U.S. criticism has whipped up resentment and a mood of victimization among Serbs, who say they were justified in taking harsh measures against what they consider ethnic Albanian terrorists. Even opponents of the government are furious at Washington's threat of new sanctions, believing they will do nothing but deepen sympathy for Milosevic's authoritarian regime and further deplete Yugoslavia's already staggering economy.

Several recent events in Kosovo have angered administration officials. They include a threat about 10 days ago that political analyst Richard Norman -- stationed at the U.S. Embassy in Belgrade -- may be harmed, and Serbian police officers at several checkpoints have threatened to kill American journalists they stopped.

The six Americans who were arrested were staying in private homes in Pristina, capital of Kosovo. According to a Yugoslav law once commonplace throughout Eastern Europe, foreigners visiting the country are required to report their presence to local police wherever they go within three days of arrival. Hotels do this automatically for their guests.

One American diplomat likened the law to ones in the United States proscribing tearing fire-safety tags off mattresses.

The six peace activists apparently failed to register with the police. One, Peter Lippman -- variously described as the group's translator or a journalist, though it was not known for whom he worked -- was arrested and sentenced to 10 days in jail late Friday. The other five were picked up and received identical sentences in separate hearings attended by U.S. diplomats today.

Peace Workers spokeswoman Sandra Schwartz in San Francisco said the group's director, David Hartsough, had taken college students Daniel Perez, Bruce Hemmer, Daniel Sevallos and Teresa Crawford to Kosovo to monitor a March 13 student protest, the Associated Press

Copr. © West 1998 No Claim to Orig. U.S. Govt. Works

reported.

Efforts by American diplomats to visit the six were unavailing. Serbian authorities said the only official who could authorize such visits was away for the weekend.

Staff writer R. Jeffrey Smith in Rome and special correspondent Colin Soloway in Pristina contributed to this report.

---- INDEX REFERENCES ----

KEY WORDS: INTERNATIONAL

STORY ORIGIN: PRISTINA, YUGOSLAVIA, MARCH 21

EDITION: FINAL

Word Count: 691
3/22/98 WASHPOST A29
END OF DOCUMENT

Copr. © West 1998 No Claim to Orig. U.S. Govt. Works

A-732

No. 97-8214

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

RECEIVED
HAND DELIVERED
MAR 30 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ANGEL FRANCISCO BREARD,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

Supreme Court, U.S.
FILED
1998
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

# APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
April 14, 1998

Alexander H. Slaughter (VSB#05916)
Counsel of Record
William G. Broaddus (VSB#05284)
Dorothy C. Young (VSB#31155)
McGuire, Woods, Battle & Boothe LLP
One James Center, 901 E. Cary Street
Richmond, VA 23219
(804) 775-1085

Michele J. Brace (VSB No. 36748)
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-8439

Counsel to Angel Francisco Breard

6 pp

## APPLICATION FOR STAY OF EXECUTION

Petitioner, Angel Francisco Breard, by counsel, moves this Court to issue an order staying Breard's execution, which is scheduled for April 14, 1998.

Breard, a citizen of Paraguay born in Argentina, filed his first, and only, federal habeas corpus petition on August 30, 1996, based in part upon Virginia's violation of the Vienna Convention on Consular Relations (the "Vienna Convention" or the "treaty") in connection with his case. Two weeks after Breard's petition was filed, the Republic of Paraguay, its Ambassador to the United States and its Consul-General filed a federal complaint (denoted hereafter as the Paraguay suit) based upon the same facts as Breard's Vienna Convention claim, seeking declaratory and injunctive relief against several officials of the Commonwealth of Virginia to vindicate rights conferred upon Paraguay and the Consul-General by the Vienna Convention. After the Fourth Circuit Court of Appeals affirmed the District Court's dismissal of both cases,[1] the Circuit Court for Arlington County set April 14, 1998, as the date for Breard's execution. A copy of this order is attached as Exhibit A.

The plaintiffs in the Paraguay suit filed a Petition for Certiorari in the Court on February 24, 1998. Republic of Paraguay v. Gilmore, No. 97-1390. On March 22, 1998 they filed an Application for Stay of or Injunction Against Execution pending Disposition of Petition for Certiorari. On March 11, 1998, Breard filed a Petition for a Writ of Certiorari in the Court. Breard v. Greene, No. 97-8214. On March 23, 1998, Breard filed in the Court of Appeals an Application for a Stay of Execution which was denied on Friday, March 27, 1998. A copy of the order of the Court of Appeals is attached as Exhibit B.

Breard asks the Court to stay his scheduled execution to afford it the opportunity to consider both his Petition for Certiorari and that filed by Paraguay and its officials in a

---

[1]Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998); Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998).

thoughtful manner and without the pressure of an imminent execution date, and in the event the Court grants the petitions for *certiorari*, or either of them, the time required to render its decisions.

A stay of execution should be granted if it is reasonably probable that four members of this Court would consider any of the underlying issues sufficiently meritorious for a grant of *certiorari*, there is a significant possibility that the decision of the Court of Appeals will be reversed, and irreparable harm is likely to result if the decision is not stayed. Barefoot v. Estelle, 463 U.S. 880, 895 (1983). Breard satisfies this standard with respect to all of the questions presented in his Petition for a Writ of Certiorari.

Breard's case raises an important issue not yet resolved by this Court concerning the unquestioning determination by the District Court and the Court of Appeals that the jurisprudential doctrine of procedural default overrides the dictates of the Vienna Convention. Breard argues in his Petition for Certiorari that the rights to consular notification and access granted by Article 36(1) of the Vienna Convention are not subject to the doctrine of procedural default because Article 36(2) of the treaty exempts its provisions from the operation of domestic laws that would deprive the consular notification requirement of "full effect."

As Judge Butzner of the Court of Appeals noted in his concurring opinion in this case,[2] the Convention affects Americans who travel abroad each year and who might be taken into custody by officials of another country. If America's domestic procedural rules bar any legal remedy when an alien in this country is convicted and given what some nations deem a "barbaric" sentence of death without the knowledge or intervention of his consulate, the

---

[2]Breard v. Pruett, 134 F.3d at 622.

United States is in no position to protest if another country's procedural rules are used to the same effect against Americans detained abroad.

The interpretation and application of Article 36 of the Vienna Convention present important questions that it is reasonably probable that four members of this Court will consider sufficiently meritorious for a grant of *certiorari,* and there is a significant possibility that the decision of the Court of Appeals will be reversed. This Court ought to be able to consider carefully the issues raised both in this case and in Paraguay's case without the looming deadline of Breard's execution.

Assuming *arguendo* that Vienna Connection claims could be procedurally defaulted, Breard has asserted that the novelty of the claim provides cause for the default. Mr. Breard's trial counsel, appellate counsel, and state habeas counsel, like nearly all other criminal defense and habeas lawyers in the country, reasonably were unaware of the treaty's consular notification provision and would not have discovered it in the course of reasonable and diligent investigation. The continuing validity of, and application of, the novelty doctrine make it reasonably probable that four members of the Court will consider this issue meritorious for a grant of *certiorari*, and establish a significant possibility that the decision of the Court of Appeals will be reversed. See Reed v. Ross, 468 U.S. 1 (1984).

Finally, Breard asserts that the Virginia Supreme Court's method for performing the state-mandated proportionality review violates federal due process because it deprived him of his life and liberty interest in the procedure prescribed by statute for the review. This case gives this Court an opportunity to provide guidance concerning the extent to which the Due Process Clause requires compliance with proportionality review statutes. Because of the importance of this issue and the number of states employing similar statutes, it is reasonably probable that four members of the Court will consider the underlying issue sufficiently

meritorious for a grant of *certiorari*, and there is a significant possibility that the decision of the Court of Appeals will be reversed.

The final factor for the Court to consider in order to grant a stay of execution -- that irreparable harm is likely to result if the decision is not stayed -- is indisputable. Breard will die on April 14, 1998, unless his execution is stayed, while Virginia escapes responsibility for its flagrant violations of federal and international law and of its own statute.

## CONCLUSION

For all these reasons, the Court should stay Breard's execution pending disposition of his Petition for a Writ of Certiorari.

Respectfully submitted,

ANGEL FRANCISCO BREARD

By Counsel

Alexander H. Slaughter (VSB#05916)
William G. Broaddus (VSB#05284)
Dorothy C. Young (VSB#31155)
MCGUIRE, WOODS, BATTLE & BOOTHE LLP
One James Center, 901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000

Michele J. Brace (VSB# 36748)
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-8439

**CERTIFICATE**

I certify that a copy of the foregoing was hand delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, on March 30, 1998.

Alexander H. Slaughter

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Non-Corrigé
Uncorrected

CR 98/7

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1998

*Public sitting*

*held on Tuesday 7 April 1998, at 10 a.m., at the Peace Palace,*

*Vice-President Weeramantry, Acting President, presiding*

*in the case concerning the Application of the Vienna Convention on Consular Relations*

*(Paraguay v. United States of America)*

*Request for the Indication of Provisional Measures*

---

VERBATIM RECORD

---

ANNEE 1998

*Audience publique*

*tenue le mardi 7 avril 1998, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Weeramantry, vice-président, faisant fonction de président*

*en l'affaire de l'Application de la convention de Vienne sur les relations consulaires*

*(Paraguay c. Etats-Unis d'Amerique)*

*Demande en indication de mesures conservatoires*

---

COMPTE RENDU

---

*Present:*

| | |
|---|---|
| Vice-President | Weeramantry, Acting President |
| President | Schwebel |
| Judges | Oda |
| | Bedjaoui |
| | Guillaume |
| | Ranjeva |
| | Herczegh |
| | Shi |
| | Fleischhauer |
| | Koroma |
| | Vereshchetin |
| | Higgins |
| | Parra-Aranguren |
| | Kooijmans |
| | Rezek |
| Registrar | Valencia-Ospina |

*Présents :* M. Weeramantry, vice-président, faisant fonction de président en l'affaire
M. Schwebel, président
MM. Oda
Bedjaoui
Guillaume
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Mme Higgins,
MM. Parra-Aranguren,
Kooijmans
Rezek, juges

M. Valencia-Ospina, greffier

*The Government of the Republic of Paraguay is represented by:*

H. E. Mr. Manuel María Cáceres, Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands, Brussels,

*as Agent;*

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Barton Legum, Debevoise & Plimpton, New York,

Mr. Don Malone, Debevoise & Plimpton, New York,

Mr. José Emilio Gorostiaga, Professor of Law at the University of Paraguay in Asunción and Legal Counsel to the Office of the President of Paraguay,

*as Counsel and Advocates.*

*The Government of the United States of America is represented by:*

Mr. David R. Andrews, Legal Adviser, United States Department of State,

*as Agent;*

Mr. Michael J. Matheson, Deputy Legal Adviser, United States Department of State,

*as Co-Agent;*

Mr. John R. Crook, Assistant Legal Adviser for United Nations Affairs, United States Department of State

Ms Catherine Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State

*as Counsel and Advocates;*

Mr. Sean D. Murphy, Legal Counsellor, United States Embassy, The Hague,

Mr. Robert J. Ericson, United States Department of Justice,

*as Counsel.*

*Le Gouvernement de la République du Paraguay est représenté par:*

S. Exc. M. Manuel Maria Cáceres, ambassadeur du Paraguay au Royaume de Belgique et au Royaume des Pays-Bas, à Bruxelles,

*comme agent;*

M. Donald Francis Donovan, membre du cabinet Debevoise et Plimpton, New York,

M. Barton Legum, membre du cabinet Debevoise et Plimpton, New York,

M. Don Malone, membre du cabinet Debevoise et Plimpton, New York,

M. José Emilio Gorostiaga, professeur de droit à l'Université du Paraguay à Asunción et conseiller juridique de la Présidence du Paraguay,

*comme conseils et avocats.*

*Le Gouvernement des Etats-Unis d'Amérique est représenté par:*

M. David R. Andrews, conseiller juridique du département d'Etat des Etats-Unis,

*comme agent;*

M. Michael J. Matheson, conseiller juridique adjoint principal du département d'Etat des Etats-Unis,

*comme coagent;*

M. John R. Crook, conseiller juridique adjoint chargé des questions concernant les Nations Unies au département d'Etat des Etats-Unis,

Mme Catherine Brown, conseiller juridique adjoint chargé des affaires consulaires au département d'Etat des Etats-Unis,

*comme conseils et avocats;*

M. Sean D. Murphy, conseiller juridique à l'ambassade des Etats-Unis, La Haye,

M. Robert J. Ericson, du département de la justice des Etats-Unis,

*comme conseils.*

The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. The Court meets today, pursuant to Article 74, paragraph 3, of the Rules of Court, to hear the observations of the Parties on the request for the indication of provisional measures submitted by the Republic of Paraguay in the case concerning the *Application of the Vienna Convention on Consular Relations* (*Paraguay* v. *United States of America*).

Article 32, paragraph 1, of the Rules of Court provides that, if the President of the Court is a national of one of the parties to a case, he shall not exercise the functions of the presidency in respect of that case. The President of the Court, Judge Schwebel, will therefore not be exercising the functions of the presidency in this case and it falls to me, in my capacity as Vice-President of the Court, to do so, in accordance with Article 13 of the Rules of Court.

The proceedings were instituted on 3 April 1998 by the filing in the Registry of the Court of an application by the Government of the Republic of Paraguay against the United States of America. In that Application, the Government of Paraguay refers, as a basis for the Court's jurisdiction, to Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963.

Paraguay claims that the United States has acted in violation of obligations owed to Paraguay under Article 36, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations. It contends that,

> "In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna Convention, such authorities tried and convicted Mr. Breard and sentenced him to death"

and asks the Court for *restitutio in integrum*, or

> "the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention".

I will now ask the Registrar to read out the decision requested of the Court, as formulated in paragraph 25 of the Application of Paraguay:

The REGISTRAR:

"The Republic of Paraguay asks the Court to adjudge and declare:

(1) that the United States, in arresting, trying, convicting and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of 'procedural default', or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts."

The VICE-PRESIDENT: Thank you. Immediately after the filing of the Application, on 3 April 1998, the Agent of Paraguay filed in the Registry of the Court a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. Paraguay stated, in that request, that

"By order dated 25 February 1998, the Circuit Court of Arlington County, Virginia, United States of America, has ordered that on 14 April 1998, pursuant to Virginia Code § 53.1-234, Mr. Breard be electrocuted or injected with a lethal substance until he is dead."

Paraguay further indicated that

"Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour."

It asked the Court to treat the matter as one of "the greatest urgency" in view of "the extreme gravity and immediacy of the threat".

I will now ask the Registrar to read out the provisional measures which the Agent of Paraguay, in paragraph 8 of the request, asks the Court to indicate.

The REGISTRAR:

"On behalf of the Government of Paraguay I therefore respectfully request that, pending final judgment in this case, the Court indicate:

*(a)* That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;

*(b)* That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph *(a)* immediately above and the results of those actions; and

*(c)* That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case."

The VICE-PRESIDENT: Immediately upon the filing of the Request, the certified copy of the Request for the indication of provisional measures to which reference is made in Article 73, paragraph 2 of the Rules of Court, was transmitted to the Government of the United States.

Immediately upon the filing of the Request, letters were sent by the Vice-President of the Court to each of the Parties, pursuant to Article 74, paragraph 4, of the Rules of Court, drawing their attention to the need to act in such a way as to enable any Order the Court might make on the request for provisional measures to have its appropriate effects.

According to Article 74 of the Rules of Court, a request for the indication of provisional measures "shall have priority over all other cases" and if the Court is not sitting when the request is made, it is to be convened forthwith for the purpose of proceeding to a decision on that request. Moreover, the date of the oral proceedings must be fixed in such a way as to afford the Parties the opportunity of being represented at it. Consequently, following a meeting held between the Vice-President and the representatives of both Parties on the date the request was filed, the Parties were informed that the date for the oral proceedings contemplated by Article 74, paragraph 3, of the Rules of Court, during which they could present their observations on the request for the indication of provisional measures, had been fixed as 7 April 1998 at 10 a.m.

I note the presence in Court of Agents and Counsel of the two Parties. The Court will first hear the Republic of Paraguay, the Applicant on the merits and the State which has requested the indication of provisional measures. I accordingly give the floor to His Excellency Mr. Manuel Cáceres, Agent of Paraguay.

Mr. CACERES:

**1. Introduction**

Mr. President, Mr. Vice-President and distinguished Members of the Court. My name is Manuel María Cáceres. I am the Agent for the Government of the Republic of Paraguay in this case.

**2. Attempts to Resolve Dispute**

Paraguay recognizes the busy schedule of this Court. Paraguay therefore deeply appreciates the Court's willingness to convene on this request for provisional measures on such short notice.

Paraguay further recognizes that, given its national, Angel Francisco Breard, is scheduled to be executed exactly one week from today, the Court must act with great alacrity if its decision on Paraguay's request for provisional measures is to have any effect. Again, Paraguay deeply

appreciates the deliberative efforts that the Court and its Members will now be required to devote to our request.

I therefore wish to assure the Court that Paraguay has filed this Application and asserted this request for provisional measures only after exhaustive efforts to resolve this dispute without intervention of this Court. As detailed in Paraguay's Application, Paraguay has attempted to resolve the dispute not only through diplomatic negotiations, but also by taking the unusual step of pursuing relief through the municipal court system of the United States of America. None of these avenues has proved fruitful.

Just last week, Paraguay and the United States resumed efforts in the form of a series of high-level meetings in Asunción, which both parties hoped would make it possible to avoid recourse to this Court.

To our regret, however, no resolution has been achieved. Thus, as the Court knows, we initiated proceedings last Friday and have asked the Court to indicate provisional measures that will ensure that Paraguay's national is not executed during the pendency of these proceedings.

**3. Introduction of Counsel**

To make Paraguay's oral submission in support of its Application for provisional measures, I now introduce Professor José Emilio Gorostiaga, Professor of Law at the University of Paraguay and Legal Counsel to the Office of the President of Paraguay. I also introduce Mr. Donald Francis Donovan of Debevoise & Plimpton in New York, and Mr. Barton Legum also of Debevoise & Plimpton in New York and Mr. Don Malone as well of the same law firm.

Mr. Donovan will commence our oral submissions.

The VICE-PRESIDENT: Thank you. Mr. Donovan, please.

Mr. DONOVAN:

## II. SUMMARY, TREATIES, AND JURISDICTION

### 1. Introduction and Summary

Mr. President, Mr. Vice-President, and distinguished Members of the Court.

We are acutely aware of the time pressure under which the Court takes up this matter in light of the scheduled execution of Angel Francisco Breard, Paraguay's national, on 14 April, this coming Tuesday. In our scheduling meeting on Friday, the Court made it clear that it wished us to keep our oral submissions as brief as possible, and if at all possible to no more than one hour. We will certainly respect that request.

This case facilitates a succinct submission as it arrives at this Court, the case presents a straightforward dispute both as a matter of the underlying facts and of the governing principles of law. We believe as well that the circumstances relevant to our request for provisional measures — most importantly, of course, the impending execution — are also plain to see. Accordingly, we are confident that the need for real expedition in this matter will not in any way compromise the Parties' opportunity to present their observations to the Court.

I will begin Paraguay's oral submissions by setting forth the treaty provisions from which Paraguay's claims arise and the jurisdictional basis for those claims.

My colleague Mr. Legum will then set forth the facts out of which the claims arise.

I will then address the Application for provisional measures in light of the present posture of the dispute.

And finally, Dr. Gorostiaga will briefly elaborate on the importance Paraguay attaches to the interests at stake in this matter.

### 2. Substantive Treaty Rights at Issue

Paraguay bases its Application in this Court on the Vienna Convention on Consular Relations, to which both Paraguay and the United States are parties. The Convention, as this Court well

knows, is the modern cornerstone of consular rights and privileges, but it is a cornerstone that rests on centuries of accumulated experience.

Article 5 *(e)* of the Vienna Convention includes protecting the interests of a sending State's nationals and providing consular assistance to nationals of the State as among the consular functions protected by the Convention.

Article 36 implements certain provisions of Article 5 *(e)* in the case of detained nationals. Paragraph 1 of Article 36 provides a detailed procedural mechanism to be followed in all cases where a national is detained by another State party.

Subparagraph *(a)* of paragraph 1 establishes the guiding principle of free consular access — that is, consular officers of the sending State must have free access to and communication with nationals of that State, and nationals must have free access to and communication with their consular officers. That is the very basis of the means by which consular assistance is provided.

Subparagraph *(b)* establishes the precise procedure to be followed when a national of the sending State is detained by the competent authorities of the receiving State. Specifically, the authorities of the receiving State must "without delay" inform the national of his or her right to consular assistance and to have the consul advised of the detention. Further, if the national so requests, the authorities must "without delay" inform the consular post of the sending State. Finally, any communication by the national to the consular post must be forwarded to the authorities, again "without delay".

Subparagraph *(c)* describes the consular officers' procedural rights with respect to detained nationals. They have the right to visit and to correspond and to converse and to arrange for legal representation.

Paragraph 2 of Article 36 provides that all of these rights "shall be exercised in conformity with the laws and regulations of the receiving State". That provision, however, is subject to the proviso that "the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the Article are intended". Thus, while States have the authority

to regulate the means by which consular rights are exercised, the municipal laws and regulations cannot operate to deprive the consular officers or the national of the rights granted; to the contrary, the proviso — which was adopted over an alternative that would have permitted substantial dilution of the rights granted by way of municipal law requirements — makes clear that the municipal laws must ensure that "full effect" be given to such rights.

I should point out that Article 36 in Paraguay's view creates rights not only for the State party, but also for the detained national.

And as the Court will have noted, Paraguay in this case seeks redress for both categories of rights. It brings the action on its own behalf for violations of rights owed to it, and it also brings the action in the exercise of diplomatic protection in light of the breach of duties owed to its national.

**3. Jurisdiction**

Finally, the Vienna Convention includes an Optional Protocol, again to which both Paraguay and the United States are parties.

Article I of the Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction" of this Court, the Application may be brought by any party to the dispute being a party to the Protocol.

I will address jurisdiction more fully after Mr. Legum has advised the Court of the relevant facts. For the moment, I simply wish to point out that Paraguay founds jurisdiction in this case on Article I of the Optional Protocol.

I turn now to Mr. Legum.

The VICE-PRESIDENT: Thank you, Mr. Donovan. Mr. Legum, please.

Mr. LEGUM:

## III. FACTS

### 1. Introduction

Mr. President, Mr. Vice-President and distinguished Members of the Court. I will this morning summarize the facts and proceedings in the United States concerning the case of Angel Francisco Breard.

### 2. The Crime and the Arrest

Mr. Breard is a Paraguayan national. In 1986, at the age of 20, he left Paraguay to reside in the United States.

On 1 September 1992, Mr. Breard was arrested by law enforcement authorities of the Commonwealth of Virginia, one of the States of the United States. Mr. Breard was suspected to have raped and murdered a Virginia woman named Ruth Dickie.

Neither at the time Mr. Breard was arrested, nor at any point thereafter, did Virginia law enforcement authorities inform him of his right to receive consular assistance from the Paraguayan consulate. Nor did they ever advise the Paraguayan consulate of his detention. Neither the Virginia authorities nor the United States contend otherwise.

The Virginia authorities did not provide Paraguay the opportunity to consult with Mr. Breard and arrange for appropriate legal representation. Instead, the Virginia court itself appointed counsel for Mr. Breard. The lawyers appointed by the court were familiar with the Virginia criminal justice system. They had no familiarity, however, with the justice system or culture of Paraguay and were not equipped to address misconceptions concerning the functioning of the American justice system that a Paraguayan national might be expected to have.

### 3. The Trial and Sentence

Virginia brought Mr. Breard to trial and determined to seek the death penalty.

As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the course of the criminal proceedings against him.

Perhaps most important, he rejected a plea offer that the Virginia authorities made before trial. The Virginia authorities offered to recommend a sentence of life imprisonment if Mr. Breard would plead guilty to the charges against him. Against the advice of his court-appointed attorneys, Mr. Breard rejected that offer.

Instead, Mr. Breard waived his right not to incriminate himself, took the witness stand and confessed to the murders. These actions ruled out any possibility that Mr. Breard would receive an acquittal and subjected him to one of three possible penalties under Virginia law: life imprisonment, life imprisonment with a $100,000 fine against him or the death penalty.

Therefore, in rejecting the plea offer and confessing at trial, Mr. Breard exposed himself to the risk of a death sentence without any possibility of receiving a lighter sentence than what the Virginia authorities had offered to him in the plea offer before trial.

Mr. Breard's decision to confess and reject the plea offer was based on a misunderstanding of the United States justice system and how it differed from the Paraguayan justice system. Where a confession at trial might appeal to the mercy of a Paraguayan court, such a confession in the Virginia trial served only to seal Mr. Breard's fate.

Paraguayan consular officers are familiar with the characteristics of both justice systems, understand the misconceptions of Paraguayan nationals about the United States justice system and are skilled in explaining the differences in terms that Paraguay nationals can understand. Had a Paraguayan consular officer been permitted to assist Mr. Breard, the officer would have provided Mr. Breard with information that would have enabled him to make more informed decisions in the conduct of his defence.

Even with Mr. Breard's confession at trial, the jury found it a close question whether to apply the death penalty. The jury transmitted a note to the trial judge enquiring whether it could sentence Mr. Breard to life in prison and at the same time recommend that he not be released on parole. Because such a sentence was not provided for under Virginia law at the time, the judge did not respond to the note.

At the conclusion of the 1993 trial, the jury found Mr. Breard guilty of the murder, and he was sentenced to death. Had he had the assistance of Paraguayan consular officers, that result would have been different, at least with respect to the sentence.

**4. Post-Conviction**

Mr. Breard appealed his conviction and sentence to Virginia's appellate courts. His appeals were denied. He also petitioned the state courts of Virginia for relief from his detention by way of a writ of *habeas corpus*. That petition was also denied.

In sum, Mr. Breard was detained, tried, convicted, sentenced to death and had exhausted all of the remedies available to him in the state courts of Virginia without ever receiving the notification and consular assistance to which he was entitled under Article 36 of the Vienna Convention.

In the spring of 1996, without benefit of information from the authorities of Virginia and the United States, Paraguay finally learned that Mr. Breard was imprisoned in Virginia and awaiting execution. Paraguayan and consular officers immediately began rendering assistance to Mr. Breard.

At the time Paraguay first contacted Mr. Breard, he was entirely unaware of his rights under the Vienna Convention. He was unaware of those rights precisely because the authorities of the United States had failed to comply with their obligation to notify him of his rights under the Vienna Convention.

In late August 1996, Mr. Breard took the final step available to him for challenging his conviction and sentence: filing a petition for a writ of *habeas corpus* in a federal court of first instance. For the first time, Mr. Breard raised violations of the Vienna Convention.

In November 1996, the federal court of first instance denied Mr. Breard's petition for *habeas corpus*. The court held under the municipal law doctrine of procedural default, Mr. Breard could not assert the violations of the Vienna Convention as a basis relief in the federal *habeas* proceedings because he had not done so in his prior legal proceedings.

The court held the doctrine to bar his Vienna Convention claims even though he had failed to raise those claims not through any choice on his part, but rather because the Virginia authorities had failed to notify him of his rights as required by the Convention.

The intermediate federal appellate court affirmed the lower court's decision on 22 January 1998. This affirmance exhausted all of the municipal law remedies available to Mr. Breard as a matter of right.

In light of the exhaustion of such remedies, by order dated 25 February 1998 the Virginia court that had sentenced Mr. Breard set an execution date of 14 April 1998.

Mr. Breard is scheduled to be moved on Friday 10 April 1998, from the maximum security prison where he is currently incarcerated to the facility in another town of Virginia where the execution chamber is housed. Absent intervention, at 9 p.m. one week from today Virginia will, in the words of the authorizing statute, "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead" (Va. Stat. Ann. § 53.1 234).

**5. Breard's Petition to the Supreme Court**

Mr. Breard has now petitioned the United States Supreme Court for a writ of certiorari and requested a stay of his execution.

Several aspects of the procedure in the Supreme Court are important to understand.

First, review in the Supreme Court is not a matter of right but is a matter of discretion rarely exercised. Less than five percent of all petitions for certiorari are granted. The situation is no different in cases involving the death penalty: prisoners facing execution routinely petition the Court and request a stay, and the Court routinely denies.

Second, in cases involving an imminent execution, the Supreme Court typically does not rule on the petition and request for a stay of execution until shortly before the scheduled execution. Often the decision is communicated telephonically to the petitioner a few hours before the execution.

I now turn to Mr. Donovan to set forth Paraguay's Application for provisional measures.

The VICE-PRESIDENT: Thank you Mr. Legum. Mr. Donovan please.

Mr. DONOVAN:

## IV. NEED FOR PROVISIONAL MEASURES

Paraguay asks this Court to direct the United States to ensure that Mr. Breard is not executed until the Court has had the opportunity to rule on Paraguay's claims under the Vienna Convention as presented in its Application instituting proceedings. In Paraguay's view, the impending execution of Mr. Breard on the basis of a criminal proceeding that it is acknowledged by the competent authorities of the United States did not comply with the requirements of the Vienna Convention establishes the need for provisional measures in this case with unusual clarity.

I will set forth Paraguay's Application in four steps. First, I will demonstrate the Court's jurisdiction. Second, we will discuss the relationship of the provisional measures sought to the rights Paraguay seeks to vindicate in this matter in order to show that the measures sought are the minimum necessary to preserve the possibility of an effective final judgment. Third, we will describe the circumstances that establish the urgency of the Application, and finally, I will set forth the basis of Paraguay's claim that it faces irreversible damage.

*First*, the matter Paraguay brings to this Court is plainly a "dispute arising out of the interpretation or application of the Convention". As Mr. Legum explained, neither the United States nor the competent authorities of the Commonwealth of Virginia have ever suggested that Virginia officials complied with Article 36 of the Vienna Convention when they prosecuted Mr. Breard for capital murder. Paraguay has sought relief for the violation from the United States for the past 18 months, both through diplomatic channels and — although it was under no obligation to do so — through the municipal court system in the United States.

The United States, however, has taken no steps to remedy the violation. In particular, the United States has taken no steps to halt the impending execution of Paraguay's national on the basis of a conviction and sentence obtained in violation of the Convention. As a result, the parties have

a dispute within Article I of the Optional Protocol, and the Court is competent to hear Paraguay's Application.

The Court's authority to go forward on this Application for provisional measures becomes even clearer when one takes into account the principle, which this Court has stated on numerous occasions, that on an application for provisional measures the Court need not finally satisfy itself of its jurisdiction but may — given the very nature of provisional measures — proceed on the basis of a prima facie showing. Paraguay respectfully submits that the existence prima facie of jurisdiction under Article I is clear.

*Second*, the provisional measures Paraguay seeks are appropriate in light of its claims. Specifically, the measures Paraguay seeks are both *conservatory* and *conservative*.

This Court has often stated that the objective of provisional measures must be to "preserve the respective rights of the parties pending the decision of the Court". Here, Paraguay claims, a violation of Article 36 of the Vienna Convention. Paraguay claims that it suffered injury from that violation in the form of a conviction rendered against, and sentence of death imposed upon, its national.

To remedy the violation, Paraguay seeks restitution in kind and an order of non-repetition.

As to restitution, in the classic formulation of the Chorzow Court, the author of an internationally wrongful act has an obligation "as far as possible, [to] wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". Article 43 of the ILC's Draft Articles on State Responsibility is to similar effect. In its formulation the injured State is entitled to "the re-establishment of the situation which existed before the wrongful act was committed".

In this case, the re-establishment of the prior situation will require an order against the enforcement of the conviction and sentence. It may also require for example, an order directing that the plea offer which would have permitted Mr. Breard to avoid the death sentence be reconveyed.

Obviously, no such orders could have any effect if Virginia has executed Mr. Breard in the meantime.

Likewise, as to non-repetition, Paraguay will seek an order requiring the United States to ensure compliance with the Vienna Convention should Virginia choose to retry Mr. Breard, as Paraguay expects it would. That order, too, would be useless if Mr. Breard has been executed.

Clearly, then, an order directing the United States to ensure that Mr. Breard is not executed during the pendency of this proceeding is necessary to preserve Paraguay's rights in the controversy.

The Court has also stated that provisional measures should not "anticipate" the Court's judgment on the merits. As an initial matter, I should note that the relief that Paraguay seeks on the merits in this case is carefully restrained. Paraguay does not contend that Mr. Breard is not subject to re-trial or to future prosecution for the acts with which he was charged. The fundamental contention of Paraguay is that in any such re-trial Paraguay's rights and Mr. Breard's rights under the Vienna Convention must be respected. Likewise, the provisional measures that Paraguay seeks are carefully limited and in no way anticipate a judgment. Paraguay does not ask, for example, that Mr. Breard be afforded a new trial at this time, or that his conviction and sentence be in any way affected except that the death sentence — the execution — be provisionally suspended. Mr. Breard will remain in custody, and if the United States prevails on the merits in this case, Virginia will be able to go forward with the execution. Thus, the United States can complain of no harm if the Court orders the narrowly tailored provisional measures that Paraguay seeks.

*Third*, the Court has also said that provisional measures should issue only in situations of urgency. There can be no question of urgency here. As Mr. Legum has explained, neither Paraguay nor this Court can act on the assumption that the Supreme Court will grant a writ of certiorari or stay of the execution in Mr. Breard's case. As we have explained, Paraguay too has sought relief in the municipal courts of the United States. At the moment Paraguay too, in its own right and asserting only its own rights, also has a petition for certiorari pending before the United States Supreme Court and accompanying that petition it has filed an application for a stay of or

injunction against the execution. But the same situation that Mr. Legum explained with respect to Mr. Breard's own petition obtains with respect to Paraguay's petition. We believe that the petition is compelling, but we must recognize that the Supreme Court grants very few petitions, and there is no possible way to predict in the case of any individual petition whether or not it will do so.

The nature of the provisional measures that are necessary here, considered in light of the constitutional structure of the United States, adds an additional element of urgency. The order of execution is an order of a State court, that of the Commonwealth of Viriginia. While the United States plainly has the ability to comply with any order the Court may issue by obtaining a stay of the Virginia court's order of execution, it will need to intervene with State authorities in order to do so, and it may, if it is so advised, choose to call upon a federal court. In other words, unlike some other situations, if the Court indicates provisional measures forbidding the execution, the federal executive branch to which any order would first be communicated will need to act affirmatively in order to bring the United States in compliance with that indication of provisional measures. It will not be sufficient for the United States, at least in the form of its federal executive branch, simply to refrain from taking certain action. For that reason there is an additional need, with the greatest respect, for the Court to act quickly.

*Finally*, this Court has stated that the authority to grant provisional measures "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings". In other words, the Court has required a showing of irreparable injury or irreversible damage in some sense as a predicate to an indication of provisional measures. In Paraguay's view, I need not dwell on this requirement here. Needless to say, death is irreparable, irreversible and, in a very fundamental sense, irremediable. In considering requests from death-row prisoners for stays of their execution, the United States Supreme Court has held, without reservation, that in cases involving an execution, the equitable requirement of irreparable injury in seeking the equitable intervention of a stay or injunction is a given. Now that a death penalty case has reached this Court, it should be no different here.

The crimes with which Mr. Breard are charged deserve the most unequivocal condemnation. On the present state of affairs, individual states of the United States have the authority to express that condemnation in the form of the penalty of death. But even if the death penalty may still be lawfully imposed as a matter of sanction, courts entrusted to uphold the rule of law — on the international level no less than on the municipal level — must be vigilant to ensure the lawfulness, too, of the proceedings by which that penalty is imposed. To exercise that vigilance here, the Court must first indicate to the United States that it must ensure that Paraguay's national is not executed while this case is before the Court.

Dr. Gorostiaga will conclude Paraguay's submissions.

The VICE-PRESIDENT: Thank you, Mr. Donovan. Dr. Gorostiaga, please.

Mr. GOROSTIAGA:

## V. CONCLUSIONS

Mr. Vice-President, Mr. President, and distinguished Members of the Court.

My colleagues have explained the importance of consular assistance in general. I wish very briefly to highlight the importance of consular assistance in this case in particular.

The United States is one of a relatively small group of countries that still impose the death penalty. Paraguay's Constitution, by contrast, expressly forbids the death penalty and guarantees the right to life.

The severity and irreversible nature of the death penalty greatly increase the importance of consular assistance in all cases in which it is sought. There is an enormous qualitative difference between a term of imprisonment and death: a case in which the death penalty is sought against a foreign national implicates to the maximum extent possible the foreign State's interest in protecting its nationals.

Such a case therefore brings into play in the most concrete and immediate way the sending State's right to provide consular assistance.

I wish to conclude by stating that Paraguay, of course, does not condone in any way the violent crime with which Mr. Breard was charged.

Further, Paraguay does not contest in any way the authority of the United States or its constituent entities to enforce its criminal laws with respect to this or any other crime committed within its jurisdiction.

Paraguay does contend, however, that the competent authorities of the United States must enforce its criminal laws by means that comport with the obligations undertaken by the United States in the Vienna Convention.

That was not done in the case of Angel Breard.

Paraguay today requests that this Court indicate provisional measures to ensure that the possibility will remain for Paraguay to exercise its rights under that Convention in Mr. Breard's case.

Thank you.

The VICE-PRESIDENT: Thank you Dr. Gorostiaga.

The Court will now adjourn for ten minutes and resume again to hear the submissions of the United States.

*The Court adjourned from 11.00 to 11.15 a.m.*

The VICE-PRESIDENT: Please be seated. The Court now resumes its sitting to hear the submissions of the United States of America.

Mr. ANDREWS: Thank you Mr. President, Members of the Court. Before I begin my presentation I would like to express the pleasure of the United States delegation at seeing Judge Kooijmans again sitting with the Court.

1.1. Mr. President, it is again an honour to appear before the Court, although I regret that it must be in a matter so hurried and involving facts so unhappy as those involved here.

1.2. As the Court well knows, Paraguay filed this case four days ago. Because of Paraguay's decision to file at such a late date, the Court decided to hold a hearing today on Paraguay's request for provisional measures. Out of our respect for the Court, we have of course come here urgently to participate in these proceedings. This morning, we will present our reasons why the Court should not indicate provisional measures. Given the extraordinary haste of these proceedings, however, our presentations will be less fully developed than we would like. We regret the unfortunate circumstances that have led to this expedited proceeding, which prejudices not just the United States, but the ability of the Court to consider the issues before it fully and fairly. We likewise regret the fact that Paraguay has chosen to disregard the two-month period provided in the Optional Protocol to the Vienna Convention for the possible resolution of such disputes through conciliation or arbitration.

1.3. The facts of the criminal indictment underlying this case are straightforward; indeed, we should all be clear that Mr. Breard unquestionably committed the offences for which he was tried. On 17 February 1992, Mr. Breard attempted to rape and then brutally murdered Ruth Dickie, a woman in Arlington, Virginia, a suburban jurisdiction across the Potomac River from Washington D.C. He was then arrested while attempting another rape. As we shall explain, genetic and other physical evidence linked Mr. Breard to the murder and the attempted rape. Indeed, ample evidence independent of his own testimony existed to prove that Mr. Breard committed these crimes. Mr. Breard was also implicated in a third sexual assault committed before he murdered Ms Dickie.

1.4. The Arlington police took Mr. Breard into custody and charged him with serious offences. The Commonwealth of Virginia has stipulated in United States court proceedings that the "competent authorities" did not inform Breard that, as a national of Paraguay, he was entitled to have Paraguay's consul notified of his arrest. Under Article 36 of the Vienna Convention on Consular Relations, the police were obliged to tell Mr. Breard that the consul could be so notified.

1.5. Mr. Breard had lived in the United States since 1986 and speaks English well, he was appointed experienced criminal defence counsel, and was able to maintain close and regular contact with friends and family. Given the circumstances and gravity of his crime, the jury recommended that he be sentenced to death, and the judge did so. Thereafter, Mr. Breard's attorneys brought a number of further actions in Virginia state courts and in United States courts seeking reversal of his conviction and sentence. This process has continued for almost five years, involving actions in different courts in the United States, including the United States Supreme Court, where Breard's request for certiorari — in other words, discretionary review by the Supreme Court — is still pending today.

1.6. As this Court knows, the indication of provisional measures is a serious matter which the Court is cautious in exercising. That is especially true in this case, where the Court is being asked to take action that would severely intrude upon the national criminal jurisdiction of a State in a matter of violent crime. Under the Court's jurisprudence, an applicant may only obtain the indication of provisional measures of protection in narrowly-defined circumstances, which the United States submits do not exist here.

1.7. The United States principal submission to the Court is that Paraguay has no legal recognizable claim to the relief it seeks and, for that reason, there is no prima facie basis for jurisdiction for the Court in this case, nor any prospect for Paraguay ultimately to prevail on the merits. Consequently, and in accordance with its jurisprudence, this Court should not indicate provisional measures of protection as requested by Paraguay.

1.8. Paraguay has no legally recognizable claim because Paraguay has no right under the Vienna Convention to have Mr. Breard's conviction and sentence voided. Paraguay in effect asks that this Court grant Mr. Breard a new trial — a right which would then presumably accrue to any other person similarly situated in the United States or in any other State which is a party to the Vienna Convention. The United States will show in these proceedings that this is not the

consequence of a lack of notification under the Vienna Convention. The Court should not accept Paraguay's invitation to rewrite the Convention and to become a supreme court of criminal appeals.

1.9. Before describing the manner in which the United States will proceed in its presentation, I feel obliged to make a few comments about the issue of the death penalty in the United States. In a majority of the states of the United States (thirty-eight), including Virginia, voters have chosen through their freely elected officials to retain the death penalty for exceptionally grievous offences. Likewise, the United States itself authorizes the death penalty for exceptionally grievous federal offences. In practice, it is imposed, almost without exception, only for aggravated murder, as well as the case here. In all cases, the death penalty may be carried out only under substantive laws in effect at the time the crime was committed. All convictions and sentences involving the death penalty are subject to the extensive due process and equal protection requirements of the United States Constitution. They are also subject to exhaustive appeals at the state and federal levels, as has been the case with Mr. Breard.

1.10. When carried out in accordance with these safeguards, the death penalty does not violate international law. Capital punishment is not prohibited by customary international law or by any treaty to which the United States is a party. We recognize that some countries have abolished the death penalty under their domestic laws and that some have accepted treaty obligations to that effect. We respect their decisions. However, we also believe that in democratic societies, the criminal justice system, including the punishments prescribed for the most serious crimes, should reflect the will of the people freely expressed and appropriately implemented by their elected representatives. Within the United States, legislative majorities nationally and in most of the constituent states have chosen to retain the option of capital punishment for the most serious crimes.

1.11. Many other countries likewise maintain capital punishment. On the same day that Paraguay filed this case, 3 April, the Commission on Human Rights in Geneva adopted a resolution that encouraged States that have the death penalty to establish a moratorium on executions. This resolution passed, but by a sharply divided vote of 26 in favour and 13 against, with 12 abstaining.

This action reflects the diversity of views held in the international community concerning capital punishment.

1.12. Capital punishment is not the issue in the dispute between the United States and Paraguay. The actual issues are quite different. They are very narrow. They relate to the Vienna Convention on Consular Relations, to which both the United States and Paraguay are parties.

1.13. As is customary, Mr. President, the United States will not read the full citations that support our arguments, but they are included in the texts provided to the Court and to opposing counsel. Further, I wish to note that the United States reserves the right to make additional arguments regarding issues of jurisdiction or the merits of this case that are not made today for purposes of this proceeding. Our presentation will proceed as follows. Ms Catherine Brown, the Department of State's Assistant Legal Adviser for Consular Affairs, will discuss the nature of the consular function and the practice of States with regard to consular notification and the remedies when notification is not provided. She will also describe in some detail the underlying facts of Mr. Breard's case and the efforts of the United States once it became aware of the case.

1.14. Ms Brown will be followed by Mr. John Crook, the State Department's Assistant Legal Adviser for United Nations Affairs. Mr. Crook will discuss the legal factors that should guide the Court in determining whether it should indicate provisional measures and will apply those factors to this case to show that provisional measures are not warranted. In doing so, he will discuss the text of the Vienna Convention, it negotiating history, and relevant subsequent practice.

1.15. Mr. Matheson, the State Department's Principal Deputy Legal Adviser and Co-Agent in this case, will address additional, prudential reasons for the Court not to issue provisional measures in this case, by noting the problems that would be created were the Court to assume the role asked by Paraguay.

1.16. After Mr. Matheson's presentation, I will return to the podium to provide a brief closing. Thank you, Mr. President. I ask you now to invite Ms Brown to the podium.

The VICE-PRESIDENT: Thank you Mr. Andrews. I give the floor now to Ms Catherine Brown.

Ms BROWN: Mr. President, Members of the Court,

2.1. It is a privilege and honor to be appearing before this Court for the first time.

2.2. My task is to explain to the Court the factual background of this dispute. I will review how the United States has responded to the concerns expressed by the Government of Paraguay, including the results of our investigation into the facts of Mr. Breard's case. First, however, I will address the nature of the consular function and the practice of States with regard to consular notification, in so far as those facts are relevant to the issues of this case.

**I. The Consular Function**

2.3. The principal function of consular officers is to provide services and assistance to their country's nationals abroad. The Vienna Convention on Consular Relations, to which both the United States and Paraguay are parties, enumerates a wide range of general consular functions in Article 5. Article 36 addresses the specific issue of consular officers communicating with their nationals abroad.

2.4. Article 36, paragraph 1 *(a)*, provides that consular officials shall be free to communicate with their nationals and to have access to them. This case does not involve a deliberate interference with Paraguay's right to communicate with its national, Angel Breard. Moreover, since Paraguayan consular officials became aware of Mr. Breard's detention, they have been able to communicate and visit with him.

2.5. Article 36, paragraph 1 *(b)*, provides that a detained foreign national shall be permitted without delay to communicate with the relevant consular post and that competent authorities will advise the consular post of the foreign national's detention without delay if the detainee so requests. There is no serious question in this case that Mr. Breard could at any time have communicated with

a Paraguayan consular official, either directly or through his family or his attorneys, had he known and chosen to do so.

2.6. Article 36, paragraph 1 *(b)*, concludes with the "consular notification" obligation that is at issue in this case: it provides that "the said authorities shall inform the person concerned without delay of his rights under this paragraph". Virginia authorities apparently did not so advise Mr. Breard, at the time of his arrest, or at any time prior to his conviction and sentence, that he could communicate with a consular official. But that does not mean that he was impeded or dissuaded from obtaining consular assistance. He, or his family, or his attorneys, might at any time have enlisted the assistance of a consul, as is frequently the case. The option of calling one's embassy or consul for help is widely known, and many governments advise their own nationals to call their embassy or consul in an emergency abroad.

2.7. Article 36, paragraph 1 *(c)*, provides that consular officials may visit their nationals in detention, converse and correspond with them, and arrange for their legal representation. Again, there was no deliberate effort to interfere with this right, and since becoming aware of Mr. Breard's detention Paraguayan consular officials have been able to visit and communicate with him. With respect to legal representation, arrangements were made by the State of Virginia for two clearly competent lawyers to represent Mr. Breard. Thus a consul proved unnecessary to perform this function.

2.8. Finally, Article 36, paragraph 1 *(c)*, concludes that a consular officer shall refrain from taking action on behalf of a national who is in prison if he expressly opposes such action. This provision is of particular interest here because Mr. Breard did not accept — indeed he adamantly resisted and even rejected — the advice not only of his attorneys, but also of his mother a Paraguayan national.

2.9. Several additional points are noteworthy. First, neither Article 5 nor Article 36 imposes any obligations on consular officers themselves. A consular officer may or may not choose to undertake any particular function on behalf of his countrymen. Consequently, the practice of

States — and even of individual consuls — in assisting their nationals varies widely. Some countries are very active, while others are passive or even quite frankly uninterested or unable to provide any significant consular assistance. A country may have just one or two consular officials in a capital city, and none at a more remote location. A country's consular officials may make frequent prison visits or visit only selectively, if at all. Each country decides for itself what it will do. This in turn creates expectations among its nationals as to whether seeking consular assistance would be worthwhile.

2.10. Second, nothing in these Articles elevates the rights of foreign nationals above those of citizens of the host country. A foreign national is expected to obey the host country's laws, and is subject to its criminal justice system. Consular officers assist their nationals within this context. Consistent with this, Article 5 *(i)* of the Vienna Convention limits the rights of consular officers to represent or to arrange representation of their nationals before the tribunals of the receiving State. They may do so only "subject to the practices and procedures obtaining in the receiving State". The United States does not permit foreign consular officials to act as attorneys in the United States, nor may its own consular officers abroad act as attorneys for American citizens. We believe that this is the general practice of States.

2.11. Third, the Vienna Convention does not make consular assistance an essential element of the host country's criminal justice system. This is inevitable, given that consular officers have no obligations to act in any particular way vis-à-vis a host country's criminal justice system. A consul may do nothing at all, leaving the justice system to run its course. Or, the consul may visit the detainee; may ensure that the detainee's family is aware of the detention; may assist the detainee in securing counsel, if necessary; and may follow developments so that any questions about the fairness of the proceedings can, if appropriate, be discussed with host country officials. But the consular officer is not responsible for the defence because he cannot act as an attorney.

## II. State Practice With Respect to Consular Notification

2.12. Two additional aspects of state practice are relevant: how faithfully do governments provide notification and what remedies, if any, are provided by governments for failures to notify? Because it is important that the United States respond appropriately to allegations of violations of consular notification, the Department of State recently made inquiries to all of our Embassies and, through them, directly to governments on these matters. While our information remains incomplete, we believe that it fairly reflects the range of state practice.

2.13. Practice with respect to notification: Compliance with respect to the obligation to notify the detainee of the right to see a consul in fact varies widely. At one end of the spectrum, some countries seem to comply unfailingly. At the other end, a small number seem not to comply at all. Rates of compliance seem partly to be a function of such factors as whether a country is large or small, whether it has a unitary or federal organization, the sophistication of its internal communication systems, and the way in which the country has chosen to implement the obligation. Countries have chosen to implement the obligation in different ways, including by providing only oral guidance, by issuing internal directives, and by enacting implementing legislation. Some apparently provide no guidance at all.

2.14. If a detainee requests consular notification or communication, actual notification to a consul may take some time. It may be provided by telephone, but sometimes a letter or a diplomatic note is sent. As a result there may be a significant delay before notification is received and, consequently, critical events in a criminal proceeding may have already occurred before a consul is aware of the detention. And, as noted previously, the consul may then respond in a variety of ways. For these reasons, and because of the wide variation in compliance with the consular notification requirement, it is quite likely that few, if any, states would have agreed to Article 36 if they had understood that a failure to comply with consular notification would require undoing the results of their criminal justice systems.

2.15. Practice with respect to remedies: Let me turn now to what our inquiries revealed about state practice with respect to remedies. Typically when a consular officer learns of a failure of notification, a diplomatic communication is sent protesting the failure. While such correspondence sometimes goes unanswered, more often it is investigated either by the foreign ministry or the involved law enforcement officials. If it is learned that notification in fact was not given, it is common practice for the host government to apologize and to undertake to ensure improved future compliance. We are not aware of any practice of attempting to ascertain whether the failure of notification prejudiced the foreign national in criminal proceedings. This lack of practice is consistent with the fact and common international understanding that consular assistance is not essential to the criminal proceeding against a foreign national.

2.16. Notwithstanding this practice, Paraguay asks that the entire judicial process of the State of Virginia — Mr. Breard's trial, his sentence, and all of the subsequent appeals, which I will review momentarily — be set aside and that he be restored to the position he was in at the time of his arrest because of the failure of notification. Roughly 165 States are parties to the Vienna Convention. Paraguay has not identified *one* that provides such a *status quo ante* remedy of vacating a criminal conviction for a failure of consular notification. Neither has Paraguay identified any country that has an established judicial remedy whereby a foreign government can seek to undo a conviction in its domestic courts based on a failure of notification.

2.17. In the United States today, foreign nationals and the Government of Paraguay are attempting to have our courts recognize such a remedy as a matter of United States domestic law. But if our courts do so, the United States will become, as far as we are aware, the first country in the world to permit such a result. A number of foreign ministries have advised us that this result would certainly or most likely not be possible in their countries.

2.18. It is not difficult to imagine why such remedies do not exist. As noted, consular assistance, unlike legal assistance, is not regarded as a predicate to a criminal proceeding. Moreover, if a failure to advise a detainee of the right of consular notification *automatically*

required undoing a criminal procedure, the result would be absurd. In particular, it would be inconsistent with the wide variation that exists in the level of consular services provided by different countries. But it would be equally problematic to have a rule that a failure of consular notification required a return to the *status quo ante* only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. Doing so would require access to normally inviolable consular archives and testimony from consular officials notwithstanding their usual privileges and immunities. In this case, for example, one might wish to examine Paraguay's consular instructions and practices as of the time when Mr. Breard was arrested and inquire into the resources then available to Paraguay's consular officers. Surely governments did not intend that such questions become a matter of inquiry in the courts.

### III. The United States Response To The Failure of Notification

2.19. Against this background, I would now like to advise the court of the steps taken by the United States relating to this case in an effort to be responsive to Paraguay's concerns.

2.20. The United States received official notice of Mr. Breard's case in April 1996 through a diplomatic note from Paraguay's Embassy in Washington. Significantly, the note did not allege a breach of the Article 36 consular notification obligation. It did not request consultations to discuss the case. It did not ask for any United States government intervention other than to facilitate efforts to obtain information from Virginia, which the Department of State did. The Department later learned, from Mr. Breard's attorneys, that those attorneys were attempting to challenge Mr. Breard's conviction based on an apparent failure of consular notification and litigation brought by Mr. Breard.

2.21. In September 1996, Paraguay filed suit against Virginia in a federal trial court. The suit sought to restore the *status quo ante* for Mr. Breard on the theory that only such action could vindicate Paraguay's governmental rights in consular notification.

The Department of State discussed the case with representatives of Paraguay in October 1996 and later received a request from the Paraguayan Ambassador for assistance in obtaining a new trial for Mr. Breard. That request failed to provide any evidence that consular law or practice would require such a result. Nevertheless, United States officials met with counsel for Paraguay about the matter and gave the issues raised by the suit careful consideration. Ultimately, the United States concluded that Paraguay's remedy for the consular notification failure lay in diplomatic communications with the Department of State. The United States so advised both the court in which Paraguay's case was pending and Paraguay's Ambassador. The United States did not object to Mr. Breard's own efforts to raise the consular notification issues in the courts, but neither did it support them.

2.22. On 3 June 1997, the Department received another letter from the Ambassador. I note that this letter is not referenced in Paraguay's Application to this Court. In it the Ambassador advised that Paraguay thought that the dispute should be resolved in the domestic courts of the United States, and not by this Court, but that Paraguay nevertheless would agree with the United States to come to this Court. This proposal was conditioned: the domestic United States proceedings should be stayed and the United States should waive any jurisdictional objections it might have to the jurisdiction of this Court and the United States should agree to require Virginia to accept this Court's decision. Like Paraguay's previous correspondence, this letter again failed to offer any serious explanation of why the remedy Paraguay was seeking was appropriate.

2.23. The Department of State nevertheless then decided to undertake an investigation into the case. In our investigation, we received the full co-operation of Virginia and we reviewed all facts relevant to the consular notification issue. This included the critical portions of the transcript, including Mr. Breard's testimony and an affidavit from his defence lawyers concerning their efforts on his behalf.

2.24. Through this process, we learned the following relevant facts:

(1) Mr. Breard unquestionably committed the offences for which he was tried. He was arrested while attempting a rape. Genetic and other physical evidence linked him to the earlier murder and attempted rape of Ruth Dickie. Ample evidence existed to prove that Mr. Breard committed these crimes, entirely independently of his own testimony. Indeed, nothing in Paraguay's submission suggests that Mr. Breard did not commit the crimes for which he was sentenced. Paraguay instead suggests that a consular officer might have persuaded Mr. Breard to make different tactical decisions;

(2) Mr. Breard had almost immediate and thereafter continuing contact with his family. He testified that one of the first phone calls he made at the time of his arrest was to his uncle. His mother and a cousin were involved in his defence, and his mother testified at his trial. Contacting family members is normally one of the first and most important things that a consular officer does when a national is detained, but here consular assistance to accomplish this proved unnecessary;

(3) Mr. Breard first came to the United States 1986 and thus had been resident in the United States for about six years at the time of his arrest. He had been married briefly to an American. This made it difficult to accept Paraguay's contention that Mr. Breard did not understand American culture;

(4) Mr. Breard had a good command of English. His lawyers had no difficulty communicating with him in English. He testified at his trial in English and the transcript of his testimony attests to his command of the language. Mr. Breard told the judge that he had no problems with English and was comfortable speaking it. Moreover, the state would have provided an interpreter had one been needed. Thus, Paraguay's implication that Mr. Breard was tried unfairly in a language he did not understand is demonstrably false. While a consular officer might help interpret for a detained foreign national, such assistance was not needed by Mr. Breard;

(5) Mr. Breard was represented by two criminal defence lawyers experienced in death penalty litigation. They spent at least 400 hours — the equivalent of 50 days — on his case. United States courts subsequently concluded that their legal representation met the requirements of the United States Constitution for the effective assistance of counsel. These attorneys worked closely with Mr. Breard, his mother, a female cousin, and his religious counsellor from jail, who was of Bolivian origin, to prepare his defence. They communicated with Mr. Breard's personal friends to find witnesses who could testify on his behalf. They communicated with persons in Paraguay to find evidence that would assist in his defence. They arranged for the court to appoint three experts to examine Mr. Breard's mental competence, and they obtained his medical records from Paraguay and from Argentina, so as to explore fully the possibility of an insanity defence and to develop mitigation evidence. Paraguay's assertion that it could have paid for witnesses from Paraguay appears irrelevant, because both his mother and cousin came from Paraguay to assist and there is no indication that there were other witnesses who were not used because of financial constraints;

(6) Mr. Breard decided to plead "not guilty" and to testify in both the penalty and sentencing phases of his trial contrary to the advice of his legal counsel and his mother — a strategy that was clearly unwise. This is the principal tactical decision Paraguay asserts it could have changed, but it is clear that Mr. Breard was advised against it by his own lawyers and his mother, yet rejected their advice. He was fully apprised of the risks of his strategy in the context of the American legal system. Access to a consular officer, who would have been less familiar with that system than his own lawyers, would not have made Mr. Breard's tactical decisions more informed;

(7) there is no credible evidence that Mr. Breard's decision to plead "not guilty" and testify was founded on a cultural misunderstanding. He was born and lived his early years in Argentina, he went to Paraguay for his secondary education and then he came to the United States to study English. As noted, he had been in the United States for six years and married to an

American briefly. Significantly, as noted, his mother was also Paraguayan and yet she as a Paraguayan understood the error of his judgment well enough to advise him not to do what he did. And again, finally, his lawyers unequivocally explained to him that his strategy would not work. He signed a statement confirming that he was rejecting their advice and was not afraid of the outcome even if it resulted in a sentence of death;

(8) although Mr. Breard's legal counsel apparently thought that Breard had the opportunity to plead guilty in exchange for a life sentence, at best only very general preliminary discussions were held on this matter and they were never seriously pursued. Virginia officials have advised us that no actual offer of a plea agreement was ever made and that none would have been made, because of the strength of the government's case and the aggravated circumstances of the crime. Virginia would not affirmatively have agreed to a life sentence because under Virginia law a life sentence would have permitted Mr. Breard's future release. Thus Paraguay's assumption that Mr. Breard could have avoided the death penalty through a plea bargain does not withstand scrutiny;

(9) objective evidence indicates that the jury and the judge could easily have decided on the death penalty even if Mr. Breard had not testified. There was evidence that the murder was "aggravated" within the meaning of Virginia law, both by the "vileness" of the particular circumstances surrounding it and by the continuing danger that Mr. Breard posed to the community. This evidence supported imposition of the death penalty under Virginia law and the judge, who had to approve the jury's recommendation, would have known that a life sentence meant the possibility of future release;

(10) finally, Mr. Breard had the full protection of the criminal justice system. In addition to competent court appointed counsel, he had full judicial review. His conviction and sentence were reviewed and sustained by the Virginia trial court and the Virginia Supreme Court, and subsequently by a federal district court and a federal appeals court. The consular notification

issue was being raised only after these procedures had been completed, in yet two more entirely separate legal proceedings.

2.25. In July 1997, the Department reported the results of its investigation in a letter to the Ambassador. That also is not referred to in Paraguay's Application to this Court. Because it found no evidence of consular notification or access, the Department expressed deep regret that such notification apparently was not provided to Mr. Breard. The Department advised, however, that there was no basis for concluding that consular assistance would have altered the outcome. It further stated that it saw no appropriate role for this Court.

2.26. Significantly, the Government of Paraguay has never responded to that letter, either to contest its factual assumptions or to address the Department's conclusion that consular notification would not have made a difference. Even so, the United States has continued to have periodic communications and discussions about the case with Paraguay. These discussions included assurances given as recently as February of this year by senior Paraguayan government officials that they recognized that this case was unprecedented and unlikely to succeed. On 30 March, however, Paraguay unexpectedly advised the United States that it would file this suit unless the United States engaged in consultations and stayed Mr. Breard's execution. Still prepared to address in diplomatic channels any issues relating to consular notification, the United States agreed to engage in such consultations. The United States did so even though it was unable to stay the execution — which is in the hands of the United States Supreme Court and the Governor of Virginia — and even though it continues to believe that this Court is not an appropriate forum to address Paraguay's concerns.

2.27. In addition to these specific measures relating to Mr. Breard's case, the United States has also intensified its long-standing efforts to ensure that all federal, state, and local law enforcement officials in the United States are aware of and comply with the consular notification and access requirements of Article 36. Guidance on these requirements has been issued regularly by the Department of State for many years. Recently, however, the Department has issued a new

and comprehensive guidance on this subject, along with a pocket-sized reference card for law enforcement officers to carry on the street. These materials have been personally provided by the Secretary of State to the United States Attorney-General and to the Governor of every state of the United States including, of course, Virginia. They have also been provided by the Department's Legal Adviser, Mr. Andrews, to every state Attorney-General, and they are being disseminated throughout the United States. In addition, the Departments of State and Justice have begun conducting briefings on these issues for state and federal prosecutors, and law enforcement officials, focusing particularly on areas with high concentrations of foreign nationals. Through these and other efforts, the United States is both acting to correct the circumstances that led to the failure of consular notification in Mr. Breard's case and acting in a manner consistent with state practice. Nothing more is required.

2.28. Mr. President, that concludes my factual presentation of the consular issues raised by this case. I thank the Court for its attention and invite it now to call upon Mr. Crook to speak.

The VICE-PRESIDENT: Thank you, Mrs. Brown. I call now on Mr. John Crook.

Mr. CROOK:

3.1. Mr. President, Members of the Court, it is again an honour and a pleasure for me to appear before you. My presentation will consider several important legal factors that should guide the Court in determining whether to indicate provisional measures in this case. I will show why, for a number of reasons, the Court should not indicate the measures requested by Paraguay.

## I. The Significance of Provisional Measures

3.2. I must begin by underscoring the gravity and importance of the decision now before the Court. As the Court well understands, the indication of provisional measures is a matter of serious consequence. The decisions of this Court clearly show the need for caution before taking such action. This reflects, first of all, the impact on the authority and the responsibility of sovereign States that such measures may have. It also reflects the fact that such measures may be indicated

only after hurried and incomplete proceedings, and that is particularly true here where the Court is sitting to hear a case that was filed less than 96 hours ago.

3.3. It is for such reasons that the Court and commentators have stressed the exceptional nature of the Court's provisional measures power. I refer the Court, for example, to its Order in the case concerning *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, (I.C.J. Reports 1976*, paras. 32 and 11) and, as Mr. Andrews indicated, the citations in all these matters are contained in the transcript we have handed to the Registry. Thoughtful opinions by individual Judges have examined the point in greater detail. I refer you to Judge Shahabuddeen's opinion in the case concerning *Passage Through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July, 1991, (I.C.J. Reports 1991*, p. 29); Judge Lachs in the *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, (I.C.J. Reports 1976*, p. 20); the dissenting opinions of Judges Winiarski and Badwi Pasha in the case concerning the *Anglo-Iranian Oil Co., Interim Protection, Order of 5 July, 1951, (I.C.J. Reports 1951*, p. 97) where they observed that "[m]easures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State". Judge Lachs, I think, well summed up the consequences in his separate opinion in the *Aegean Sea* case: "the Court must take a restrictive view of its powers in dealing with a request for interim measures".

3.4. The basic factors guiding the Court's decision whether or not to use its exceptional power to indicate provisional measures are laid down in the Statute of the Court. Article 41 envisions that the Court will carry out two separate, although inter-related, examinations. In the interests of time, I shall not read Article 41 but I would refer the Court to it, in particular Article 41(1).

3.5. As the Court will see, that text envisions two separate lines of enquiry. First, the Court's decision whether to indicate provisional measures is to be guided by an assessment of the overall context or circumstances of the case before it. Second, any measures to be indicated are of a nature

"which ought to be taken to preserve the respective rights of either party". I shall consider each of these aspects in turn.

**II. Provisional measures are not warranted in these circumstances**

3.6. I shall begin by showing how provisional measures are not warranted in these circumstances. Now Article 41 shows that the Court can and should consider the totality of circumstances involved in a case in deciding whether the indication of provisional measures is appropriate. Other members of the United States team are treating some particularly relevant circumstances. The Agent of the United States, Mr. Andrews, briefly addressed issues relating to the timing of this case. He noted the prejudice, both to the United States and to the judicial process, that follows from the Applicant's decision to file its case at the time it chose to do so. Ms Brown described the facts underlying Paraguay's claim, showing how it departs from the realities of international consular practice. She also showed how the failure to inform Mr. Breard of his right to consular access had no bearing on his trial, conviction and sentence. In our next presentation, Mr. Matheson will analyse yet other relevant circumstances, particularly the implications of this case for other States and for the Court.

3.7. My own discussion will be focused on two interrelated aspects of Paraguay's legal claim. First, I will show how the Court does not have jurisdiction to provide the remedy that Paraguay seeks in its Application. Then I will show how, in assessing whether to indicate provisional measures which may substantially prejudice the party against which they are directed, the Court must weigh the nature of the legal claims before it. The Court should not exercise its exceptional power to indicate provisional measures that prejudice the target State, where the moving Party's claims are legally unfounded or are unlikely to prevail.

3.8. Now as I shall show, particularly given the drastic consequences of Paraguay's basic legal claim — that the lack of consular notification invalidates each and every subsequent conviction of any alien in any State party to the Vienna Convention on Consular Relations — that

claim should not prevail. Neither the Convention's language, nor its history, nor State practice supports it.

*No Jurisdiction.*

3.9. Because of the fundamental flaws that undermine Paraguay's claim for relief, the Court has no jurisdictional basis for the measures now requested. Now admittedly, the showing of jurisdiction at the stage of preliminary measures is less substantial than is required at later stages of the case. As the Court recently summarised in its Application of the Genocide Convention Order

> "[O]n a request for provisional measures, the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant . . . appear, prima facie, to afford a basis on which jurisdiction of the Court might be established." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 11, para. 14.)

Although the burden of showing jurisdiction is lower now than it will be at later stages of this case, the Applicant still has a burden to meet. Paraguay has not met that burden.

3.10. Article I of the Optional Disputes Settlement Protocol to the Vienna Convention on Consular Relations gives the Court jurisdiction over disputes arising out of the "interpretation or application" of the Convention. However, there is no dispute here about either the interpretation or the application of the Convention. The Parties do not disagree on what it means to "inform" a foreign national of his rights under Article 36, paragraph 1 *(b)*, of the Convention. Nor do they dispute that Mr. Breard was not so informed.

3.11. Instead, Paraguay's claim in this case, in essence, is that under the Vienna Convention the Court can void Mr. Breard's criminal conviction and sentence, and require that he be given a new trial. As I will show, the Vienna Convention does not provide for such an extraordinary form of relief. Paraguay may object to the appropriateness of a criminal conviction and sentence under United States law and practice, but this is not a dispute about the interpretation or application of the Vienna Convention.

3.12. Paraguay tries to meet this difficulty by invoking the doctrine of *restitutio in integrum* (Paraguay's Application, p. 11, para. 25). Paraguay cannot, however, create a right that does not otherwise exist under the Vienna Convention on Consular Relations — the Court's sole basis for jurisdiction in this case — simply by invoking a general principle of the law on reparation. Paraguay has failed to make a prima facie showing that the Court has jurisdiction to grant the exceptional relief it seeks here. Under the circumstances, under the Court's well-settled jurisprudence, there is no jurisdictional basis for the Court to indicate provisional measures.

3.13. In this respect, this situation is similar to that faced by the Court in the provisional measures phase of the *Lockerbie* case (case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Order, 14 April 1992*, Request for the Indication of Provisional Measures, para. 43) There, the Court found, as a prima facie matter, that there was no legal basis for the Libyan claim under the Montreal Convention because of the adoption of a resolution of the Security Council. The Court therefore rejected Libya's request for provisional measures because "the rights claimed . . . under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures". In a similar way here, there is no legal basis for the rights that are claimed by Paraguay. Those claims too are not an appropriate basis for the indication of provisional measures.

***The Merits of Paraguay's Claim.***

3.14. Obviously, the Court cannot consider the merits at this stage in a case that is 96 hours' old. Nevertheless, in addition to assessing whether it has jurisdiction to proceed, the Court must weigh the totality of circumstances bearing on Paraguay's request for preliminary measures. In so doing, the Court must consider the doubtful nature of the core legal proposition that Paraguay is advancing — that the Convention requires the invalidation of every conviction and sentence of any person who has not received consular notification required by the Convention.

3.15. The difficulties with Paraguay's legal position must be confronted at this stage, and this ought to be an important element in assessing the appropriateness of provisional measures. As Dumbauld wrote at the time of the Permanent Court, "if it is apparent that the applicant cannot succeed in his main action, preliminary relief will of course be denied" (Edward Dumbauld, *Interim Measures of Protection in International Controversies* 165 (1932).

**A. Plain Meaning of the Text**

3.16. What are the legal difficulties? To begin with, Paraguay's claim conflicts with the plain meaning of the text. Absolutely nothing in the language of Article 36, paragraph 1, of the Vienna Convention on Consular Relations (or in any other Article of the Convention) offers support for Paraguay's claim that failure of consular notification requires invalidation of any subsequent conviction and sentence of an alien.

3.17. Paraguay's claims follow from Article 36, paragraph 1, of the Vienna Convention, to which both the United States and Paraguay are parties. Article 36 establishes the basic régime for consular assistance to nationals who may be detailed in the receiving State.

Article 36, paragraph 1, provides:

> "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> *(a)* consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> *(b)* if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested . . . shall also be forwarded to the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph."

3.18. Mr. President, as was described by Ms Brown, when the competent federal authorities learned that Mr. Breard may not have been told when he was arrested that Paraguay's consul could

be notified, the United States authorities investigated thoroughly. When they concluded that a violation of Article 36, paragraph 1, probably had occurred, they took action in co-operation with the Commonwealth of Virginia to try to prevent any recurrence. Senior United States officials apologized to Paraguay, and offered further consultations. As Ms Brown just noted, when Paraguay recently proposed that the two sides enter into formal consultations, the United States promptly agreed to that proposal. Unfortunately, however, and notwithstanding Article II of the Optional Disputes Settlement Protocol to the Convention, Paraguay chose to bring its action here instead.

3.19. Thus, there is no legal dispute between the United States and Paraguay regarding the need to give notification as provided for under Article 36, that such notification was not given, and concerning the need to take effective steps to prevent recurrence. The sole issue concerns the consequences under international law if an arrested alien is not told that his consul can be notified. The United States contends that the solution to such a breach of the treaty's requirements is to be pursued through normal processes of diplomatic apology, consultation and improved implementation.

3.20. Paraguay, however, asks this Court to impose much more drastic consequences. Paraguay's Application maintains that the necessary legal consequence for any such breach is that the ensuing conviction and sentence must be put aside. There is absolutely no support for this claim in the language of the Convention. The Court should not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation that has no support in the language agreed by the parties.

3.21. Mr. President, there are very few situations in which States actually have agreed by treaty that the failure to observe specific standards can be the basis for appeal to an international tribunal for possible reversal of a conviction or sentence. I have in mind here, for example, regional instruments and institutions such as the European Convention on Human Rights and the Strasbourg Court. Where States have elected to create such mechanisms, they have done so

expressly and with great precision. They have not created such additional remedies by indirection or implication, as Paraguay asks the Court do here. Let me return to the negotiating history.

**B. Negotiating History**

3.22. Likewise, there is no support for Paraguay's claim there. We know of nothing in the history — and Paraguay has pointed to nothing — even hinting that the Parties intended failure to comply with Article 36, paragraph 1, to invalidate subsequent criminal proceedings.

3.23. The Vienna Convention was negotiated on the basis of draft articles prepared by the International Law Commission. The relevant ILC proposals do not contain the obligation to inform an arrested person that their consul could be notified. That was added at the Conference. We have found nothing in the debates of the conference supporting Paraguay's claim, but there are a number of indications to the contrary.

3.24. Article 36 was negotiated with great difficulty at the Vienna Conference. The final version was only agreed upon two days before the Conference ended. Some delegations supported the ILC's initial draft of Article 36, which would have required that receiving States automatically notify sending States' consuls if a national was arrested. A large number of other States strongly opposed this requirement. They argued, among other things, that it would impose an excessive administrative burden on the receiving State and that the national might not want his government authorities to know about his arrest. (Luke T. Lee, *Consular Law and Practice* (1990), pp. 138-139.)

3.25. Ultimately, a compromise had to be reached. The compromise involved a series of amendments to the ILC draft. I will not try to trace all of these for you, but I will mention one because it helps to show that States at the Conference clearly did not intend that failure of consular notification would invalidate subsequent legal proceedings. The negotiations began with the ILC draft providing for consular notification in the case of arrest. That was widely criticized as unreasonably burdensome and impractical. Accordingly, various narrowing amendments were offered by groups of countries.

3.26. One, offered by Egypt and accepted by the Conference, changed the initial language to state that the obligation to inform the sending State only arises if the national so requests. The delegate of Egypt explained his amendment as follows:

> "The purpose of the amendment is to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. *The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to the pressure of work or other circumstances, there was a failure to report the arrest of a national of the sending State.*" (Twentieth Plenary Meeting on 20 April, 1963, United Nations Conference on Consular Relations, Official Records, p. 82, at para 62. Emphasis added.)

The explanation of this amendment (which was adopted by the Conference) clearly suggests that the Conference saw the normal processes of diplomatic adjustment as the means to address failure of a notification requirement. The Conference did not foresee that defects of consular notification would result in the invalidation of subsequent criminal proceedings. Had the parties thought so, the many States that already expressed fears about the burden of the notification requirement would surely have voted down the text that is before you today.

3.27. Other statements during the Conference reinforce that the Parties did not intend the Convention to alter the operation of domestic criminal proceedings. The delegate from the USSR stated that "the matters dealt with in Article 36 were connected with the criminal law and procedure of the receiving State, which were outside the scope for the codification of consular law" (*ibid.*, p. 40, para. 3). The delegate from Belarus expressed similar views, noting that "the Conference was drafting a consular convention, not an international penal code, and it had no right to attempt to dictate the penal codes of sovereign States" (*ibid.*, p. 40, para. 8). Such statements directly conflict with Paraguay's claim today. Thus, the negotiating history does not support Paraguay's broad view of the consequences of non-compliance with Article 36, and a variety of statements made during the debate support a contrary view.

**C. State Practice**

3.28. Likewise, there is no support in state practice for Paraguay's position. As Ms Brown explained, after the Breard case initially came to the attention of the United States federal authorities, the United States Department of State surveyed the practice of the States parties to the Vienna Convention. That survey found no State — none — that adopted the position Paraguay urges on the Court here. Paraguay has referred to no such State practice here.

3.29. The few national court cases that we know have considered the matter have not reached the result urged by Paraguay. Lee's treatise *Consular Law and Practice* cites an Italian case where the Italian authorities failed to provide the required consular notice to Yater, a British national. According to Lee, the challenge to Yater's conviction was rejected.

> "The Supreme Court *(Cassazione)* held that the consular role in assisting the defence of his fellow nationals under the Vienna Convention on Consular Relations is of 'a complementary and subsidiary nature, and does not replace the right of the accused to make his own arrangements for his own defence'. Since Yater in this case had adequately defended himself during proceedings through a lawyer chosen by him, the plea was dismissed." (Luke Lee, *Consular Law and Practice* p. 150-151, citing *Cassazione*, 19 Feb. 1973, *re Yater*. Summary and Commentary in 2 *Italian Yb. Int'l L.* 336-9 (1976).)

The issue also has been energetically litigated in United States courts. Indeed, Mr. Donovan, the distinguished counsel for Paraguay, has been a prominent participant in litigation in the United States urging that this approach be adopted as a matter of United States domestic law. However, no United States court has found that the failure of consular notification, standing alone, constitutes a sufficient basis for invalidating a sentence and conviction.

**D. No Injury to Mr. Breard**

3.30. Finally, as Ms Brown has explained, the notion that Mr. Breard suffered injury because of any failure of consular notification is speculative and unpersuasive. Paraguay's Application asks this Court to indicate provisional measures largely on the basis of some bold assumptions about what Paraguay's consul might have done. In doing so, the Application presents an inflated and unrealistic description of a consul's functions in criminal matters. A consul is not a defence

attorney. Consular protection does not immunize a national from local criminal jurisdiction. What a consul can do is help arrested persons arrange means for their own defence. A consul can notify an arrested person's family, or help to ensure that the defendant has local defence attorneys. A consul does not typically retain lawyers to defend her nationals; the United States does not do so, and Paraguay has not established that it normally does so either.

3.31. But, as we have shown, Mr. Breard was able to accomplish all these things quite effectively without the assistance of Paraguay's counsel without the assistance of Paraguay's consul. He spoke English and had lived in the United States since 1986. After his arrest, he was in regular contact with his family. He was defended by able attorneys throughout his trial and the many subsequent legal proceedings. A consul could not have done more to enhance the effectiveness of Mr. Breard's legal defence.

### E. Conclusion

3.32. For all of these reasons — the lack of any textual basis in the Convention, the lack of support in the negotiating history and State practice, and the absence of injury to Mr. Breard — Paraguay's basic claim in these proceedings lacks legal foundation. Because there is no basis for the remedy Paraguay seeks in the Convention, the Court lacks jurisdiction. The weakness of Paraguay's legal claim is also a compelling reason for declining to indicate provisional measures.

## III. Provisional Measures and The Rights of the Parties

3.33. Mr. President, my final section, will be relatively brief. I will first address the role of provisional measures in relation to the protection of the rights of the Parties. I will explain why such measures should not be indicated in a form that would create a selective or unjust balance with regard to the Parties. I will then show how, in deciding whether to indicate particular provisional measures, the Court must consider whether those measures improperly prejudge the outcome of the dispute.

3.34. Mr. President, the provisional measures sought by Paraguay amount to a determination on the merits of this case. If the measures sought by Paraguay are indicated and implemented, Paraguay will have won, at least for a period of however many years may be required for the Court to arrive with its final judgment. Paraguay will have advanced its key objective through a hurried and unbalanced proceeding that cannot adequately address the serious legal issues that are at stake.

3.35. This cannot be reconciled with the régime for provisional measures envisioned under Article 41 of the Statute. Article 41 says that the Court may indicate, where circumstances require, "any provisional measures which ought to be taken to preserve the respective rights of either party". Take note: "the respective rights of either party". Provisional measures should not protect the rights of one party, while disregarding the rights of the other. But that is precisely what is requested here. As Paraguay has made clear, its goal here is to prevent the operation of the criminal laws of the Commonwealth of Virginia. It seeks to do so where there is no doubt that the accused committed very grave and violent offences, and where there have already been five years of extensive appellate litigation in national courts. As Mr. Matheson will elaborate in our next presentation, this would significantly impair the rights of the United States to the orderly and conclusive functioning of its criminal justice system.

3.36. Moreover, provisional measures should not be indicated in terms or in circumstances where they constitute a disguised adjudication on the merits. Professor Rosenne makes this point strongly in his remarkable new treatise:

> "The power to indicate provisional measures cannot be invoked if its effect would be to grant to the applicant an interim judgment in favour of all or part of the claim formulated in the document instituting proceedings." (Shabtai Rosenne, *The Law And Practice of the International Court, 1920-1996*. Vol. III, p. 1456.)

Nevertheless, this is precisely what Paraguay seeks. Paraguay is asking this Court for a concealed adjudication on the merits of this case through the guise of provisional measures.

3.37. This is exactly the type of case Judge Oda warned of in his recent essay on provisional measures. As he wrote:

"In recent cases, the actual matters to be considered during the merits phase have been made the object of the requested provisional measures . . . [T]he applicant States appear to have aimed at obtained interim judgments that would have affirmed their own rights and preshaped the main case." (Oda, "Provisional Measures. The Practice of the International Court of Justice," *in Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, Lowe and Fitzmauice, eds., p. 553.)

3.38. Judge Oda goes on to warns of the implications of this, and of the possibility that:

"the Court . . . be tempted to deliver an interim judgment under the name of provisional measures . . . If the tendency is to be for the Court to arrive at a quick decision on matters relating to the merits, while reserving for the future other much more judicious consideration on the question of jurisdiction as well as the merits . . ., then the whole matter requires very careful consideration." (*Ibid.*, p. 554.)

3.39. Mr. President, Judge Oda is right to be concerned, this whole matter does require very careful consideration. Provisional measures should not be used as a vehicle for a hasty and legally unjustified decision on the merits of Paraguay's claim. And thus, for all of the reasons I have indicated — because of the lack of jurisdiction, because Paraguay's claim is unsound in law, and because the requested provisional measures are unbalanced and improperly prejudge the merits, the Court should reject Paraguay's request.

3.40. I thank the Court for its attention during a long presentation. I now ask that it invite Mr. Michael Matheson, Principal Deputy Legal Adviser, to present the next section of our argument.

The VICE-PRESIDENT: Thank you Mr. Crook. Mr. Matheson has the floor.

Mr. MATHESON:

4.1. Mr. President, distinguished Members of the Court, it is once again my great honour and privilege to appear before you on behalf of the United States. Mr. Crook has explained the basis for our contention that the provisional measures sought by Paraguay are not within the jurisdiction of the Court and lack any legal foundation. I will now explain the reasons for our view that the granting of the provisional measures sought by Paraguay would be contrary to the interests of the parties to the Vienna Convention on Consular Relations, the international community as a whole, and the Court as well.

4.2. Article 41 of the Statute of the Court provides in part that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken . . .". This language clearly indicates that the Court may or may not choose to exercise this power in a particular case, depending on whether it believes the circumstances require it and whether it believes the particular measures proposed ought to be taken. (See, for example, *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976*, separate opinion of President Jiménez de Aréchaga, p. 16.)

4.3. It follows from this that the Court should only grant provisional measures where it is satisfied that this would not only be fair and beneficial to the parties to the immediate dispute, but also would be consistent with the proper role of the Court, the interests of the Parties to the convention in question, and the good of the general international community.

4.4. In the present case, Paraguay has asked the Court to suspend decisions of the criminal courts of a State. To our knowledge, this is the first occasion on which the Court has been asked to do so. In its request for provisional measures, Paraguay has asked the Court, in a matter of a few days, to scrutinize and suspend for an indefinite period the considered decisions of the trial and appellate courts of Virginia and the United States — decisions that have been taken after extensive judicial proceedings over a period of years.

4.5. This would be a very serious step, and one which could threaten serious disruption of the criminal justice systems of the parties to the Vienna Convention, and of the work of this Court as well.

4.6. There are currently over 160 parties to the Vienna Convention, of which over 50 have adhered to the Optional Protocol on Compulsory Settlement of Disputes. The Parties to the Protocol include a number of populous States, such as France, Germany, India, Japan, the United Kingdom and the United States, where very large numbers of foreign nationals have immigrated or travelled for various reasons. It is inevitable that a significant number of crimes will occur in any population group of such a size, and in fact this has occurred. It is also to be expected that in

a number of these cases, law enforcement authorities may commit, or be alleged to have committed, errors in the process of consular notification called for under the Vienna Convention.

4.7. The question is not whether such errors should be remedied. Rather, it is whether this should be left to the diplomatic process and to the domestic criminal authorities of the State in question, or whether this Court should assume the role of a supreme court of criminal appeals to deal with such cases by staying, reviewing and reversing domestic court decisions. Once the Court opens itself to this process, it can be expected that a great many defendants will press the States of their nationality to take recourse to it. This would include not only those who received no consular notification at all, but also those who may wish to claim that the notification received was deficient, incomplete, or tardy. It would include not only those who were genuinely prejudiced by the failure of consular notification, but also those who suffered little or no prejudice because they were nonetheless accorded full assistance of competent counsel and all the requirements of due process.

4.8. In principle, if such a remedy were available for violations of the Vienna Convention, why would it not also be available for alleged violations of other conventions when committed against foreign nationals in detention for criminal offenses, such as bilateral treaties with provisions for consular protection, the International Covenant on Civil and Political Rights, or other agreements with provisions concerning rights to be accorded to aliens or to any person accused of criminal offences? If States may ask this Court to stay executions and nullify convictions on the basis of violations of the Vienna Convention, would they not feel able to do so under these other agreements as well?

4.9. It is difficult to believe that the parties to these conventions really intended that this Court serve as a supreme court of criminal appeals in this manner. It is difficult to believe that they intended to subject their domestic criminal proceedings, which typically include both trial proceedings and one or more levels of appellate review, to yet another stage of review by an international tribunal. As Mr. Crook demonstrated, we know this was not the case with respect to

the Vienna Convention. We also know that such a role was not contemplated by the framers of the United Nations Charter and the Statute of the Court.

4.10. Yet this is precisely the message that the Court would give in granting the provisional measures sought by Paraguay in the present case. Delay of the execution of Mr. Breard until the Court's final disposition of the case, as Paraguay requests, would in practice mean the suspension of domestic criminal proceedings for years, whatever the final outcome. Many other defendants in many States could be expected to demand the same treatment, whether the alleged violations were serious or minor, and whether or not those violations led to any significant failures of due process in their conviction.

4.11. In other words, the indefinite stay of execution requested by Paraguay would not be a minor measure that simply preserves the status quo. It would be a major and unprecedented intrusion by the Court into the domestic criminal process that could have far-reaching and serious effects on the administration of justice in many States, and on the role and functioning of the Court.

4.12. All States have compelling interests in the orderly administration and finality of their criminal justice systems, particularly with respect to heinous crimes of the type committed by Mr. Breard. All States have compelling interests in avoiding external judicial intervention that would interfere with the execution of a sentence that has been affirmed following an orderly judicial process meeting all relevant human rights standards.

4.13. We submit that the Court should not take a step having such potentially far-reaching consequences on the basis of a few days of hurried consideration of a suit filed at the very last moment. Before taking any action to intrude into the criminal process of a State, the Court should require Paraguay to show that it does indeed have a basis for its claim in accordance with the normal, orderly process of full proceedings under Part III of the Rules of Court. In this connection, the Court should go through the process called for by Article 63 of the Statute of the Court, which calls for notification of all States parties to the Vienna Convention so as to afford them the

possibility of intervention or other submission of views to protect their own vital interests in the interpretation and application of the Convention.

4.14. Given these compelling reasons for refraining from the provisional measures sought, has Paraguay identified any basis for justifying such an extraordinary remedy? We maintain that this is not the case, since Paraguay has shown nothing to indicate that consular notification would have changed the result of the Breard case.

4.15. Neither Mr. Breard's guilt nor the heinous nature of his crime is at issue; he freely confessed in open court that he had committed the offence. In any case, his guilt was thoroughly established by compelling material evidence. Paraguay has not taken issue with this in its Application or in its argument this morning. There is no question of the execution of an innocent man.

4.16. Nor is there any evidence that Mr. Breard was prejudiced in any way by the apparent lack of consular notification. He had lived in the United States for six years and spoke English well. He understood the proceedings being conducted and participated actively in his own defence. He had full contact with his family and with persons in Paraguay. He had competent counsel well versed in the criminal law of Virginia. He was directly and strongly advised by his attorneys to refrain from the incriminating testimony which he insisted on giving. His conviction was reviewed and upheld by appellate courts of the United States and Virginia.

4.17. Paraguay's contention that the involvement of Paraguayan consular officials would have changed all this is nothing more than imaginative, but wholly unsubstantiated, and implausible speculation. The Court should not engage in an unprecedented intervention in the domestic criminal proceedings of a State on the basis of such implausible speculation. What a domestic appellate court would not do, this Court *a fortiori* should not do. This Court should not serve as a supreme court of criminal appeals in derogation of the normal operation of domestic criminal courts.

4.18. On the other hand, we fully recognize that Paraguay has a legitimate interest in ensuring that the provisions of the Vienna Convention are properly observed and that there is not a

recurrence of the apparent failure of consular notification in the Breard case. Therefore, as Ms Brown described, the United States has taken extensive measures to ensure future compliance by State and local authorities.

4.19. Further, when Paraguay requested bilateral consultations under the Convention, the United States promptly agreed to consultations on all issues raised by the Breard case. We were specifically ready to discuss the possible procedural steps provided for in Articles II and III of the Protocol concerning conciliation and arbitration. However, Paraguay insisted on an immediate stay of execution as a precondition to refraining from immediate recourse to this Court, which the United States was not in a position to grant. The United States nonetheless remains prepared to engage in bilateral consultations aimed at encouraging more effective implementation of this Convention by both Parties.

4.20. Mr. President, for all these reasons, we believe that the granting of provisional measures sought by Paraguay would have serious negative consequences for the Parties to the Vienna Convention, for the Court, and for the international community as a whole. We urge the Court not to take such a step, and certainly not after only a few days to consider the implications of such an action. We therefore encourage and urge the Court to exercise its power to deny the measures requested by Paraguay.

4.21. Once again, I thank the Court for its attention and consideration of these arguments. I now suggest that the Court recognize the Agent of the United States, Mr. Andrews, to conclude the argument of the United States and to present its Final Submission. Thank you Sir.

The VICE-PRESIDENT: Thank you Mr. Matheson. I call on Mr. Andrews, Agent of the United States.

Mr. ANDREWS:

5.1. Mr. President, this morning the Court asked the Government of Paraguay to provide copies of two letters, one dated 10 December 1996 and one dated 3 June 1997. We would be

pleased to provide the unanswered 7 July 1997 letter that the State Department sent to the Government of Paraguay, which was referenced by Ms Brown in her presentation. Mr. President and Members of the Court, this concludes the presentation of the United States. The submission of the United States is as follows: "That the Court reject the request of the Government of Paraguay for the indication of provisional measures of protection, and not to indicate any such measures".

5.2. We thank the Court for its kind attention to our presentations and its consideration of our arguments.

The VICE-PRESIDENT: Thank you Mr. Andrews. Both Parties have now concluded the first round of their oral pleadings. The Court will adjourn now and resume at 3.00 p.m. to afford both Parties an opportunity to reflect. The Court stands adjourned until 3.00 p.m.

*The Court rose at 12.50 p.m.*

Non-Corrigé
Uncorrected



International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1998

*Public sitting*

*held on Tuesday 7 April 1998, at 3 p.m., at the Peace Palace,*

*Vice-President Weeramantry, Acting President, presiding*

*in the case concerning the Application of the Vienna Convention on Consular Relations*

*(Paraguay v. United States of America)*

*Request for the Indication of Provisional Measures*

---

VERBATIM RECORD

---

ANNEE 1998

*Audience publique*

*tenue le mardi 7 avril 1998, à 15 heures, au Palais de la Paix,*

*sous la présidence de M. Weeramantry, vice-président, faisant fonction de président*

*en l'affaire de l'Application de la convention de Vienne sur les relations consulaires*

*(Paraguay c. Etats-Unis d'Amerique)*

*Demande en indication de mesures conservatoires*

---

COMPTE RENDU

---

*Present:*

| | |
|---|---|
| Vice-President | Weeramantry, Acting President |
| President | Schwebel |
| Judges | Oda |
| | Bedjaoui |
| | Guillaume |
| | Ranjeva |
| | Herczegh |
| | Shi |
| | Fleischhauer |
| | Koroma |
| | Vereshchetin |
| | Higgins |
| | Parra-Aranguren |
| | Kooijmans |
| | Rezek |
| Registrar | Valencia-Ospina |

*Présents :* M. Weeramantry, vice-président, faisant fonction de président en l'affaire
M. Schwebel, président
MM. Oda
Bedjaoui
Guillaume
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Mme Higgins,
MM. Parra-Aranguren,
Kooijmans
Rezek, juges

M. Valencia-Ospina, greffier

***The Government of the Republic of Paraguay is represented by:***

H. E. Mr. Manuel María Cáceres, Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands, Brussels,

*as Agent;*

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Barton Legum, Debevoise & Plimpton, New York,

Mr. Don Malone, Debevoise & Plimpton, New York,

Mr. José Emilio Gorostiaga, Professor of Law at the University of Paraguay in Asunción and Legal Counsel to the Office of the President of Paraguay,

*as Counsel and Advocates.*

***The Government of the United States of America is represented by:***

Mr. David R. Andrews, Legal Adviser, United States Department of State,

*as Agent;*

Mr. Michael J. Matheson, Deputy Legal Adviser, United States Department of State,

*as Co-Agent;*

Mr. John R. Crook, Assistant Legal Adviser for United Nations Affairs, United States Department of State

Ms Catherine Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State

*as Counsel and Advocates;*

Mr. Sean D. Murphy, Legal Counsellor, United States Embassy, The Hague,

Mr. Robert J. Ericson, United States Department of Justice,

*as Counsel.*

***Le Gouvernement de la République du Paraguay est représenté par:***

S. Exc. M. Manuel María Cáceres, ambassadeur du Paraguay au Royaume de Belgique et au Royaume des Pays-Bas, à Bruxelles,

*comme agent;*

M. Donald Francis Donovan, membre du cabinet Debevoise et Plimpton, New York,

M. Barton Legum, membre du cabinet Debevoise et Plimpton, New York,

M. Don Malone, membre du cabinet Debevoise et Plimpton, New York,

M. José Emilio Gorostiaga, professeur de droit à l'Université du Paraguay à Asunción et conseiller juridique de la Présidence du Paraguay,

*comme conseils et avocats.*

***Le Gouvernement des Etats-Unis d'Amérique est représenté par:***

M. David R. Andrews, conseiller juridique du département d'Etat des Etats-Unis,

*comme agent;*

M. Michael J. Matheson, conseiller juridique adjoint principal du département d'Etat des Etats-Unis,

*comme coagent;*

M. John R. Crook, conseiller juridique adjoint chargé des questions concernant les Nations Unies au département d'Etat des Etats-Unis,

Mme Catherine Brown, conseiller juridique adjoint chargé des affaires consulaires au département d'Etat des Etats-Unis,

*comme conseils et avocats;*

M. Sean D. Murphy, conseiller juridique à l'ambassade des Etats-Unis, La Haye,

M. Robert J. Ericson, du département de la justice des Etats-Unis,

*comme conseils.*

The VICE-PRESIDENT: Please be seated. The Court resumes its sessions to hear the second round of oral submissions and I give the floor now to His Excellency Mr. Cáceres of Paraguay.

Mr. CACERES: Thank you Mr. President. I would like to ask the Court to call upon Mr. Donovan to offer Paraguay's rebuttal. Thank you.

The VICE-PRESIDENT: Thank you. Mr. Donovan, please.

Mr. DONOVAN: Mr. President, Mr. Vice-President, distinguished Members of the Court.

It would be useful, I believe, to start this afternoon's session by summarizing where the Parties stand in light of this morning's submissions.

First, there is no dispute about the terms of the governing texts, Articles 5 and 36 of the Vienna Convention.

Second, there is no dispute on the basis of the United States submissions this morning that the duties owed under the Vienna Convention to Paraguay and to its national were not fulfilled by the competent authorities of the United States, and hence, that there was a violation of the Treaty.

Third, there is no dispute about the generally applicable principle of restitution, that is that the author of an offending illegal act has the obligation to restore the prior situation.

Fourth, there is no dispute between the Parties that the object of provisional measures is to preserve the Parties' rights so that the Court will be in a position, upon rendering final judgment, to render an effective final judgment, a judgment that means something.

Fifth and perhaps most importantly, there is no dispute that unless this Court orders provisional measures, Mr. Breard, Paraguay's national, will be executed on Tuesday 14 April. In Paraguay's, view these points of agreement standing alone not only support an indication of provisional measures in accord with the Court's cases and governing Statute but compel one. Nevertheless, we would like to briefly address several of the other points made by the United States this morning.

First, with respect to jurisdiction. The United States appears to contest the Court's jurisdiction on two converse grounds. On the one hand, the United States argues, it is plain, indeed the United

States concedes, that there was a violation here. While on the other hand, the United States argues, it is just as plain that the Vienna Convention affords no effective remedy for that violation. We of course agree that there was a violation, we of course disagree that there is no effective remedy but in any event, neither of these arguments can defeat the Court's jurisdiction in this case.

May I explain? There are at least two reasons why the United States concession that there was a violation here of Article 36 cannot deprive this Court of jurisdiction over the dispute. The first was well stated by the United States in its oral arguments before this Court in the Tehran hostages case. There the United States thought it prudent to address the argument, or the possible argument, that given that there was no possible legal justification for the actions by Iran of which the United States complained in that case, there might not be a dispute between the Parties coming within the Optional Protocol. And if the Court will permit me, I would remind the Court that one of the treaties on which the United States founded its claims in that case was the Vienna Convention on Consular Relations and one of the bases of jurisdiction was indeed the Optional Protocol on which Paraguay founded this case.

The United States described that argument, or any such argument, as specious. It said "the sum and substance of every case brought to the Court under the compromissory clause of a treaty is the claim that the Respondent's conduct violates its obligations under that treaty". It would be anomalous to hold that the Court has jurisdiction where there is an arguable claim that a treaty has been violated but lacks jurisdiction where there is a manifestly well-founded claim that the same treaty has been violated. Such a contention has no support in the jurisprudence or traditions of this Court or in the terms of the Optional Protocols. I continue to quote "indeed any such role would provide an incentive for States to flout their treaty obligations and to avoid offering any justification for their conduct in order to defeat the Court's jurisdiction". I would respectively suggest that the same reasoning applies here. A State party should not be permitted to divest the Court of jurisdiction by in effect confessing error, by in effect stating yes indeed our obligations were not complied with, we agree with the relevant obligation and therefore there is no dispute for all the reasons well stated by the United States in its earlier submissions.

The second reason that the concession of a violation cannot deprive this Court of jurisdiction is that, as this very case amply demonstrates, disputes about the "interpretation and application" of the Convention may well arise from disagreements about the consequences that should flow from a given violation. It may well be in this case that the Parties would be able to reach a stipulation with respect to the relevance of events and indeed perhaps reach a stipulation as to the underlying act or omission that brings the Parties to this Court and then move to a remedies phase or phase that would address the consequences that flow from those events. But that does not change the fact that there is a dispute here as to the interpretation and application of the treaty. Indeed I would suggest that the United States own arguments this morning suggest that there is very much a disagreement on the subject of what consequences should flow from the omission that is not in issue.

The United States appears to have made two additional points with respect to jurisdiction that I would also like to address.

First, in at least one formulation this morning, the United States suggested that there was no jurisdiction because Paraguay had no legally cognizable claim. We disagree with that statement of course, with respect to Paraguay's claim but I note for the moment that it would in any event not afford a basis for denying jurisdiction; it is an argument properly addressed to the merits of the claim.

Second, the United States referred to Articles II and III of the Optional Protocol. I simply want to note that this Court of course may claim again in the *Tehran* hostages case, both in the provisional measures Order and in its final Judgment, that those Articles do not in any way affect the compulsory jurisdiction of this Court under Article I.

I would like now to address several of the circumstances that the United States suggested are relevant to Paraguay's Application.

First, the United States suggested that somehow Paraguay should be penalized for having filed its Application this past Friday, in light of the impending execution on 14 April.

This Court, I believe, will appreciate the magnitude of a decision by a Government like that of Paraguay to institute proceedings in the International Court of Justice against the United States.

Needless to say, that is not a decision that is taken lightly. As we explained this morning, even last week there were discussions between the Parties as to ways to avoid the filing that was finally made late in the day on Friday.

As the United States itself advised the Court, those discussions foundered when it became clear that the United States was not prepared to take steps to halt the impending execution pending further discussions between the Parties, or pending some alternative means of dispute resolution. I add parenthetically that that is another reason of course why any recourse to Articles II and III was not available at this point, but of course an indication of provisional measures, and the continuance of this proceeding, will in no way make impossible further discussions on those topics. But for present purposes, if the Court were to now penalize Paraguay for its efforts to amicably resolve the dispute and to take all steps to avoid having to come to this Court, it would create what, we would respectfully suggest, would be an unwise different sentence to parties who wish to take every step to avoid a filing here, and for that reason we would respectfully suggest that that element should play no role in the Court's deliberations.

We would further suggest that it would be particularly inappropriate to allow any such circumstance to affect the Court's deliberations in this case.

As has been mentioned, Paraguay here went the extra mile to avoid coming to this Court. It took what we believe is a perfectly justifiable, but nonetheless unusual step, of filing a lawsuit first in the United States courts, asserting its own rights under the Vienna Convention, and seeking relief in the form of an injunction against further enforcement of the conviction and sentence of its national. It took the same position in that proceeding that it takes here, that is, it did not contest the authority of the Virginia officials to enforce its criminal law, and it did not contest the authority of the Virginia officials to re-try Mr. Breard if Paraguay received the relief it requested, if Virginia officials were so advised, which Paraguay fully expects they would be.

Because there has been some discussion of those proceedings, I would like to address two aspects of those proceedings in order to clarify the record before the Court.

First, there was a suggestion this morning that Paraguay at some point in those proceedings suggested that this case should not come before this Court, that the United States courts were the

appropriate forum. I understand the United States is going to provide the Court with a June 3 diplomatic letter. We are going to provide the Court as well with a letter that may shed some light on that exchange, which was a letter sent by Paraguay's counsel to counsel for the United States in the domestic litigation, which is of course the Department of Justice, in response to the position taken by the United States in the domestic litigation.

If the Court will permit me a moment.

In the initial proceeding in the district court, that is the federal trial court in the United States, the court held that Paraguay had standing to sue for breach of a treaty in the United States courts. It dismissed the suit, however, on an alternative jurisdictional ground that has to do with the constitutional structure of the United States, and the authority of a federal court to impose remedies against State officials. Paraguay appealed that decision.

In the court of appeals the United States filed a brief, *amicus curiae*, in which it urged the court of appeals not to rely on the ground relied upon by the district court, but instead to affirm on the alternative jurisdictional ground that a sovereign should not be permitted, that a suit by a sovereign in a court in the United States raises a non-justiciable controversy.

In the course of that brief, the United States took the position that in fact the proper form was diplomatic negotiations or this Court. At the same time, the United States suggested an argument that perhaps presaged the argument it makes here, that there would be no jurisdiction given that the Parties agreed on the obligations imposed by the Vienna Convention. In response to that position by the United States, Paraguay's counsel wrote a letter which we will happily provide to the Court, which stated what I have said this morning, that Paraguay had determined that it was appropriate to seek relief in the first instance from the municipal courts of the United States, had Paraguay been able to obtain effective relief, the Parties may never have come before this Court. Paraguay did not obtain that relief, but Paraguay has never suggested that the courts of the United States somehow by filing suit in the courts of the United States, it would somehow be foreclosed from its rights under the Optional Protocol, and the suggestion that the United States courts are in some way the appropriate forum is a bit difficult to understand in light of the position that the United States took

in the domestic litigation that a sovereign, such as Paraguay, should not be permitted to sue for breach of treaty in those courts.

There is a second aspect of the United States litigation that I believe requires clarification after this morning's submissions.

The United States referred to some litigation in the United States, relatively recent litigation, arising from claims under the Vienna Convention in death penalty cases. No court in the United States has yet reached the merits of any such claim. I would like to briefly describe the two kinds of claims that have arisen, and perhaps give the Court some appreciation of the dilemma of a Government like Paraguay that seeks to vindicate its rights.

In the first instance there have been two cases by sovereigns. The first is that by Paraguay, and the second is a suit modelled on Paraguay's action that was filed by the United Mexican States in an attempt to halt the execution of one of its nationals. In both cases the district court dismissed on the constitutional immunity ground that I have just described, and in both cases the court of appeals affirmed on that ground. In other words, in neither case did the court reach the merits of the Vienna Convention claim. Indeed in the Paraguay lawsuit, in the lawsuit brought by the Government here, the Court emphasized the importance of the Vienna Convention, but simply held that it was disabled by the XIth Amendment to the United States Constitution from ordering the relief sought against State officials.

In the second category of cases are federal *habeas* claims by prisoners themselves seeking to attack their convictions on the basis of the Vienna Convention and a failure to provide the required notification. In all of those cases of which I am aware, and there are now probably three or four, the claim has not been raised until the prisoner has reached a federal court, on a *habeas* petition, that is, the claim was not raised in the proceedings in the state court, as in Mr. Breard's case, and was not raised in the state *habeas* proceedings. In that situation, the holdings are uniform, thus far, that the stringent limitations that both the United States Supreme Court has laid down and Congress has recently codified with respect to *habeas* petitions generally, and death penalty *habeas* petitions in particular, bar the *habeas* petitioner from raising the claim. In other words, those courts too have not reached the merits, although I should note that in Mr. Breard's own case, again, one

of the judges on the panel — although he concurred in the judgment saying that the court could not provide relief — emphasized the importance of the rights at issue.

If you put the two cases involved with respect to Mr. Breard — that is Paraguay's case asserting its rights and Mr. Breard's case asserting his rights — together, the Court can appreciate the difficulty. The claim here arises from a failure to notify. Notwithstanding the discussion, the United States this morning with respect to what the Vienna Convention and what the various discussions were, it seems to me that there can be no dispute that an obligation in Article 36, paragraph 1 *(a)*, requiring the detaining State to advise the national of his right to consult consul, has a very obvious purpose, that is to ensure that that detainee is knowledgeable, becomes advised of his or her rights. And yet the combination of the holdings in Mr. Breard's case and in Paraguay's own suggest that, even in a case where the claim arises from failure to notify and the petitioner — the *habeas* petitioner, in one case — learns of the rights under the Vienna Convention only after he has gone through the proceeding in which he has been deprived of them, he is too late to raise them. Indeed, without going into the nuances of United States law, effectively the holding in Paraguay's own case, because of the peculiar limitations on federal courts' authority to provide relief, was to the same effect — that Paraguay because it was attacking or, in the understanding of the Court, attacking the judgment — was in effect too late because it would be undoing prior State action.

I do not mean to suggest that those cases are relevant to this Application. To my mind the only relevance here is that clearly Paraguay should not be penalized for some suggestion that it has delayed. Clearly there have been substantial efforts to resolve the dispute prior to reaching the Court.

There is, however, one more line of cases in the United States which may be relevant and that is, at least two courts have addressed the suggestion where the impact of a failure to notify under the Vienna Convention and the possible impact that might have on the enforcement of a conviction. We would be happy to provide the Court with a copy of the case that I am about to refer to, but it is a case from the United States Court of Appeals for the Ninth Circuit — this is one of the federal courts of appeals — and that case considered federal regulations that require federal

officials, immigration officials, to advise an alien detainee of his or her rights under the Vienna Convention. The regulations are explicitly intended to implement the Vienna Convention, the obligations. The federal court to which I refer did set aside a conviction for illegal entry after deportation as a result of the immigration authority's failure to comply with this regulation. The court reversed the conviction on the ground that the underlying order of deportation was invalid because the arresting authorities had failed to notify the defendant at the time of his initial detention of his right to contact a consular official. The court went further to determine that prejudice was present and it therefore afforded the relief. It built on, by the way, an earlier case from the same court of appeals. In short, there is authority in the United States that, in fact, a failure to comply with the Vienna Convention obligations can have an effect on the validity of a conviction obtained in the tainted proceedings and I shall return to that point in a few moments when talking about the United States submissions on the merits.

I would like to address now the United States suggestion that there is no legally cognizable claim in so far as it might be relevant not to jurisdiction but to the circumstances forming the Court's decision whether to grant provisional measures.

I should start by noting that whatever the weight of this factor in another case, it is hard to see how it could weigh against provisional measures here where there appears to be agreement on the failure to comply with the underlying obligations and the dispute is very much about the consequences that should flow. It would seem to me that the Court should exercise serious caution in deciding in the face of a conceded violation — that the applicant State does not bring a sufficiently weighty case to warrant provisional measures. I would think that that caution would apply particularly where the suggestion of the United States that there is no remedy, and hence no legally cognizable claim, appears to contradict so squarely the fundamental principle as to the remedy of restitution, the applicability of that remedy in the event of an internationally wrongful act and the substance of that remedy, that is, to restore the situation that existed prior to the wrongful act. Given that the United States position is so squarely inconsistent with that basic understanding, I would think the Court would want to exercise extreme caution before reaching a decision that somehow the Vienna Convention was intended as an exception to that principle.

In any event, however, we believe that the United States submission does not hold up even on its own terms.

First, the United States argument is essentially that the Court should conclude that Paraguay is not entitled to the remedy it seeks because one looks in vain, in Article 36 or elsewhere in the Vienna Convention, or even in the legislative history, for confirmation that that remedy is available. With all due respect, we would suggest that the United States is engaged on a misguided search. One need not find the remedy in the text of the Convention. If the United States argument were accepted, it would be necessary to reproduce the Articles on State Responsibility in every treaty and surely that is not the expectation of treaty drafters. Instead, the fundamental understanding with respect to remedies is part of a legal context in which any treaty must operate and therefore the fact that one does not find an explicit confirmation of the remedy Paraguay seeks in either the Optional Protocol or the Vienna Convention itself, should certainly not lead to the conclusion that that remedy is not available. Indeed, this Court would have to reverse or repudiate a long line of authorities because it has never imposed a requirement in considering whether particular remedy was available that that remedy appear in the given international instrument on which the claim was founded. Again, if one would recall the eminently justifiable range of remedies this Court provided in the *Tehran* hostages case one would have a hard time finding explicit confirmation for each of those remedies in the underlying instrument. In effect, the United States argument here, their reading of the Vienna Convention, will effectively limit this Court to grants of declaratory relief without the power to order a remedy. That role is plainly inconsistent with the understanding of parties who both adhere to an international treaty and subscribe to a dispute resolution protocol. It is intrinsic to the notion of a violation, as *Chorzów* itself suggests, that consequences flow from that violation.

Again, however, even on the United States own terms, even if one were looking to the Vienna Convention itself, there would not be the support that the United States finds.

First, with respect to Professor Lee's treatise. The case to which the United States referred, although it is only a brief account in the treatise, by no means suggests that a remedy is not available. Indeed, the Court actually went to the issue, or it appears from the brief account in Lee,

and decided that the applicant could not show prejudice. From the brief account in Lee it appears that that case actually supports Paraguay's argument that a remedy is available, even if it may affect the validity of the underlying conviction. Lee then follows the discussion of the Italian case, with a discussion of the two cases from the United States that I have just described which indeed do draw consequences as to the validity of an underlying conviction from a failure to notify under Article 36. To the extent that it is relevant now — and I will address that issue in a moment — the weight of Lee's treatise suggests that Paraguay is entitled to its remedies.

Likewise with respect to the negotiating history, the United States points to certain sections of that drafting history to support a contention that the parties did not intend the Convention to alter the operation of domestic criminal proceedings. Yet the history on which the United States bases its argument support an opposite conclusion. In particular, the United States referred, but not by name, to statements by Mr. Kostov, a delegate of the Soviet Union and Mr. Avakov, a delegate of Belorussia, and presented those statements as supporting the view that the Convention did not intend to alter the effect or have any effect on domestic criminal proceedings. In fact, Mr. Kostov argued further that paragraph 2 of Article 36 as then drafted, and as ultimately adopted by the Convention, was an attempt to interfere with the internal affairs of States by hampering the administration of justice in regard to aliens, and that that version would make it difficult for States to exercise their sovereign right to prosecute aliens who broke the law. Mr. Kostov and Mr. Avakov spoke in support of restoring the ILC's draft of paragraph 1 of Article 36 *(b)*. Mr. Evans, a delegate of the United Kingdom, characterizes the Soviet proposal as follows: according to Mr. Evans, it would have meant that the laws and regulations of the receiving State would govern the rights specified in paragraph 1 provided that they did not render those rights completely inoperative. In the event, however, the Conference chose to eject the proposed Soviet amendment. Thus, so far as we understand the statements, the legislative history on which the United States relies, was in support of an alternative to the provision in the Vienna Convention which would have deluded the effect of that Convention specifically with respect to its possible effect on criminal proceedings. Thus the legislative history supports the notion that the Convention in appropriate instances might even subordinate municipal criminal procedures to the provisions of Article 36, paragraph 1.

The United States has also suggested that it would be unwise for this Court to grant Paraguay the remedies it seeks because that would somehow open the floodgates to claims like that brought by Paraguay.

We would respectfully submit that, in the first instance, that the fact that others might have the same right that Paraguay might have should not deter the Court from recognizing that right in Paraguay; that would be fundamentally inconsistent with the judicial role. But in any event we do not believe that there is any basis for the scare the United States raises. Contrary to the characterization of the United States, Paraguay's Application is not an appeal to this Court and the question before this Court is not whether, in every criminal proceeding involving a foreign national, a violation of the Vienna Convention requires a new trial. Paraguay's action is not an appeal, it does not ask the Court to review or reverse any judgment of a municipal court, it does not ask the Court to review the proceedings in that court or to review the judgments of that court. Further, the question is not what remedy would be required in every criminal proceeding everywhere in the world, the question is what can Paraguay show with respect to this proceeding and on the basis of that showing, what relief would it be entitled to. The facts relevant to that enquiry are quite discreet and to the extent that, as the United States suggested this morning, it would require a consul to bring on evidence with respect of practices of the like, if a court found that relevant, the foreign sovereign could certainly make a decision when it sought the relief whether or not it wished to do so.

Finally, as this case demonstrates, cases of this kind would prompt a sovereign to come to this Court only with the greatest reluctance and even on the terms of the United States own argument, we do not think there is any basis for the concern.

Finally, the United States suggests that Paraguay's Application would require this Court to anticipate a judgment and would in fact anticipate a judgment in favour of Paraguay. That suggestion is belied by the very disciplined and narrowly tailored relief that we request. But before addressing the relief Paraguay requests, I would like to examine the United States' submissions in the light of the concern that the United States itself raises, that is that an indication of provisional measures here might anticipate a judgment. The United States comes to this Court and asks the

Court to reject Paraguay's Application on the basis of the facts that it says it will be able to prove, on the basis of a survey of State practice, of which we were advised this morning, and on the basis of a showing on the legal rights at issue that I have just addressed. Clearly the Parties disagree about certain aspects of the consequences of this behaviour. If the Court would arrest a denial of the request for provisional measures on an assumption that the United States will be able to prove its facts and Paraguay will not, that indeed would anticipate a judgment. Equally, the extent of the informal survey of State practice might be relevant to the eventual determination of this Court, surely the Court should not make a decision on the basis of the advice provided over this lectern as to an informal survey conducted by the United States Department of State. That too would surely anticipate the proof, and hence the judgment, that would be elicited at the merits phase. And finally the United States asked this Court to reject Paraguay's claim on the basis that it has no legally cognizable claim. Again, while we disagree with that suggestion and while we believe the suggestion is not supported even by the authorities that the United States cites, nothing would so surely anticipate a judgment by this Court than a conclusion that notwithstanding the violation in this case, the remedy Paraguay seeks is not available.

Conversely, Paraguay asks for provisional measures that are extremely narrow. The only thing in effect that Paraguay asks this Court to do at this time is to order that the United States ensure that Mr. Breard is not executed while this case is before the Court. We would welcome the views of other States parties that might intervene, we are certain that they would enlighten the Court and we would fully expect the Court to take into account any other State that were motivated enough to join these proceedings. But surely before receiving those views, the Court should ensure that the case stays before this Court, that the case remains in its full dimension. As I stated this morning, Mr. Breard, even if this Court grants the interim relief, will remain in Virginia's custody. If the United States prevails on the merits on this case Virginia will be able to schedule a new execution date and put him to death. Surely the United States does not mean to suggest that the delay in executing the sentence of death overrides Paraguay's interest in the life of its national to the extent that the Court would wish to balance in any way the effect of these interim measures on the two Parties, or in any way to protect against a decision here, either granting or denying the

provisional measures Paraguay seeks in a manner that anticipates its judgment. It plainly, Paraguay respectfully submits, must grant the narrowly tailored measures Paraguay seeks.

I very much appreciate the Court's courtesy this afternoon.

The VICE-PRESIDENT: Thank you very much Mr. Donovan. Before you conclude the President would like to address a question to you.

The PRESIDENT: Mr. Donovan, you referred to two United States cases which did overturn earlier decisions on the grounds of failure to comply with the Vienna Convention on Consular Relations, if I understood you correctly. Did those decisions overturning the earlier judgments lead to retrials on the original charges or simply in dismissal of the original charges.

Mr. DONOVAN: I do not know the subsequent history of those cases. I do not believe that there is anything in those cases which would suggest that a retrial would not be possible and certainly, as I have said, it is not Paraguay's position here that a retrial would be barred. But I cannot definitively answer the Court's question, but I would be happy to do so when we provide those cases subsequently.

The PRESIDENT: Thank you very much.

The VICE-PRESIDENT: May I ask what is the earliest time you could furnish an answer to that question.

Mr. DONOVAN: This afternoon, that is in so far as it is disclosed by the published accounts of those opinions.

The VICE-PRESIDENT: Thank you Mr. Donovan. That concludes the second round of oral pleading of Paraguay and we will have a short adjournment to enable the United States to make its submissions.

*The Court adjourned from 3.50 to 4.20 p.m.*

The VICE-PRESIDENT: Please be seated. We meet now to hear the second round of oral submissions of the United States, and I give the floor to Mr. Andrews, Legal Adviser to the United States Department of State.

Mr. ANDREWS: Mr. President, I would like to call to the podium Mr. John Crook to respond on behalf of the United States.

The VICE-PRESIDENT: Mr. Crook, please.

Mr. CROOK: Thank you Mr. President. Members of the Court.

In our final presentation this afternoon we will make, I believe, six points, attempting to bring together and respond to a number of the considerations that distinguished counsel for Paraguay introduced in his rebuttal. I shall try not to be too long.

My first point is this, that it seems to me that throughout this case, and certainly in the rebuttal we have just heard from Paraguay, there has been a signal of voidance of the burden of proof that the Applicant here must bear. They have in fact proved very little, if anything. Now Mr. Donovan in his presentation this afternoon tried to make up some of the deficiencies by seeking to build upon the evidence and argumentation that we gave you this morning. As to his arguments, I would simply invite the Court to consider the sources and determine in its own mind whether our reading of them, or Mr Donovan's reading of them, is the better. But it does seem to me that it is an anomalous position; a peculiar situation where the burden of the Applicant's proof is that the Respondent did not disprove the Applicant's assertions to the satisfaction of the Applicant. I would certainly disagree with that characterisation, but it does seem to me unsound in relation to the burdens that the Applicant here must bear.

There is one key issue here that I think we should take note of and it is an issue to which counsel for Paraguay did not refer, and that is the key issue of whether in fact consular access in this case would have made any difference. Counsel for Paraguay ignored that point in his summation, and it seems to me that it is an important point and is one that cannot be ignored, because all of Paraguay's case here rests on the factual premise, the assumption, the belief, that

things would have been different had a Paraguayan consul been involved. For all the reasons that we suggested, the reasons that Ms Brown suggested, that seems to us to be not the case, that the burden here is on the Applicant, the burden has not been met.

My second basic point Mr. President, is that the Applicant here seems to me have responded to large parts of the United States submission by ignoring them or trivializing them. They ignored Ms Brown's long, and I think very informative description, of the realities of consular practice. Paraguay had nothing to say about that this afternoon. In large measure they ignored the indications that we brought to you regarding the realities of how States interpret and imply their obligations under the Vienna Convention on Consular Relations. They ignored altogether the circumstances of Mr. Breard's trial, defences for which he was charged, the adequacy of his counsel, the extensive nature of the appellate remedies that he pursued. They ignored large parts of the United States submission.

My third major point, Mr. President, is that it seems to me that the presentation here by distinguished counsel for Paraguay showed an undue preoccupation with the domestic litigation in the United States in which matters similar to these are being addressed. Counsel for Paraguay indicated that in his view, those cases were not relevant. We would agree, and we therefore will not seek here to re-argue them. I do wish here though to respond particularly to the cases that were raised at the last minute, and that were the occasion of the question from President Schwebel. The Applicant will presumably make those available to the Court, and the Court can inspect them and come to its own judgment regarding their implications. Our recollection is that the cases that the Court has requested were immigration cases involving deportation orders, and not criminal cases. That is our recollection, and we suffer from not having the text with us, but it is our belief that they turned not on the Vienna Convention on Consular Relations obligations as such, but on the fact that the immigration service had failed to follow its own regulations, calling for consular notification. Under federal law, federal agencies are required to follow their regulations, and that was the basis for the courts' decision on those cases. That is our recollection, if we have mischaracterized them, the Court will soon have the opinions and will be able to see, but that is our understanding of what was involved in those cases.

My fourth point is that it seems to me that the Applicants in this case have ignored — have dealt with significant parts of the United States presentation this morning by ignoring it — or in any case by trivializing the implications. We spent a good deal of time here going through the implications of the course of action that is advocated by Paraguay, for example, for other governments, the other parties to the Vienna Convention on Consular Relations.

Counsel for Paraguay responded to that essentially by trivializing the point, saying we have one case and one case only here, and that's all the Court need concern itself about. With respect, Mr. President, that seems to me not to be good enough. With respect to the concerns of the United States, again, counsel for Paraguay minimized or trivialized the consequences of the remedy that they seek here, but again I think in all fairness, that is not good enough. The United States has significant interest in the orderly and authoritative administration of its criminal law, certainly in a case where the murder took place in 1992, the trial took place in 1993, and there appears to be no guilt, no dispute between the parties as to the guilt of the accused.

I think the same observation holds true as well concerning our points regarding the implications of the remedy sought by Paraguay for the Court. The concern is a real one, the implications for other countries and other situations are real, they cannot be ignored. That brings me closer to my final points, Mr. President.

The fifth point is the rather basic question. Is there a remedy? And the associated question, is there jurisdiction here? For the reasons that I indicated, it seems to me that the Court must consider the likelihood of Paraguay being able to show that the remedy that underlies their whole case exists and is available to them within the four corners of the Vienna Convention on Consular Relations. It is not appropriate for me here to re-argue the points I made this morning but I simply invite the Court to consider them. The point that there is no support in the text, the point that there is no support in the history, the point that there is no support in practice. I think it is a fair gloss on that, that Paraguay is quite unlikely to be able to show that the remedy it seeks either is available, or in any case, is to be found within the sphere of the Vienna Convention on Consular Relations which of course is the requirement for there to be jurisdiction. We are at something of a disadvantage because Paraguay, as the Applicant, has never really made the case. We have sought

to respond, Paraguay has then tried to make its case by dealing with our response and we are left in this very unsatisfactory situation, Mr. President, that the basic burden of the Applicant has not been met. I think I would agree here with distinguished counsel for Paraguay who, in his presentation this afternoon, used words to the effect — and I freely admit that this is a paraphrase and not a quote; I hope this is a fair paraphrase — that to find the remedy, you must go beyond the text of the treaty, that is the problem, Mr. President, there is no jurisdiction. The Applicants seem unlikely to prevail on the merits.

Let me turn to my sixth and final point, Mr. President, and that is the reference to the *Hostages* case. Now, there was I think perhaps a misunderstanding of our position and I want to deal with it, because I think it is important. It is not our contention here that the Court is divested of jurisdiction by reason of the fact that we have confessed error and admitted that Mr. Breard was not given consular notification, that is not our point at all. Our point is the much broader one, that I have just discussed, that the remedy that is sought here is a remedy that goes far beyond the scope of the Vienna Convention and far beyond the scope of the jurisdiction of the Court.

Let me respond to other points regarding the *Hostages* case. It does seem to me that it is — unseemly is perhaps too strong a word — but it is not quite right to draw upon the *Hostages* case as the precedent for action by this Court here. The *Hostages* case involved a much more aggravated situation, the continued detention of a large number of hostages in conditions of apparent danger, in violation of fundamental rules for the protection of diplomats and consuls. It was a profound, potentially very dangerous, disruption of international relations and it seems to me that it perhaps trivializes that case to analogize it to a situation where the Applicant is seeking not to deal with matters of great consequence at stake in the *Hostages* case, but rather to disrupt the operations of the criminal courts of a party to the Statute of this Court. It seems to me the analogy is not appropriate and it is not one that should illuminate the deliberations of this Court. Mr. President, I apologize that these remarks have been somewhat disjointed, the circumstances are a bit difficult, but I hope they have been of some use in clarifying our position. As always my delegation appreciates the courtesy of the Court in listening to our presentation. You have heard already the submission of the United States Agent and it is only for me to thank the Court.

The VICE-PRESIDENT: Thank you Mr. Crook. This brings us to the end of these oral hearings. I would like to express on behalf of the Court its warm thanks to the Agents, counsel and advocates of the Parties for the quality of their arguments and the courtesy and co-operation they have shown. In accordance with the usual practice, may I ask the Agents to remain at the disposal of the Court for any further information which it might need and, subject to that, I now declare closed the oral hearings on the request for the indication of provisional measures in the case concerning the *Application of the Vienna Convention on Consular Relations (Paraguay* v. *the United States)*. The Court will now withdraw to deliberate. The Order containing the decision of the Court will be read at a public sitting to be held on Thursday 9 April. There being no other matters before it today, the Court will now rise.

*The Court rose at 4.35 p.m.*

# APPENDIX B

Embassy of Paraguay
Washington, D.C.

EP/EUA/879/96

Washignton, D.C., December 10, 1996

Dear Ambassador Davidow:

The Government of Paraguay is deeply interested in the fate of the Paraguayan citizen Angel Breard, presently on death row in the Commonwealth of Virginia.

His Excellency Juan Carlos Wasmosy, President of the Republic of Paraguay, has assigned Dr. Jose Emilio Gorostiaga, Professor of Criminology at the School of Law of the National University of Asuncion the task of undertaking in the United States of America all necessary steps in order to obtain a new trial for the aforementioned Paraguayan citizen.

With the cooperation of the legal firm "McGuire, Woods" of Richmond, Virginia, Court designated counsels to Mr. Breard, a writ of Habeas Corpus has been filed before the US Senior District Judge, the Honorable Richard L. Williams based upon the premise that Mr. Breard had been denied certain rights to prepare his defense and that therefore his conviction and sentence to die in the electric chair was not in accordance with the rules of due process of law.

Likewise, before the same Judge, the Republic of Paraguay, represented by the New York law firm of "Deveboise and Plimpton" has filed suit against the Governor, the Attorney General and other officials of the Commonwealth of

Your Excellency
Ambassador Jeffrey Davidow,
Asistant Secretary of State for
Inter-American Affairs
Department of State
Washington, D.C.

Embassy of Paraguay
Washington, D.C.

Virginia for violation of the Vienna Convention of 1963 and the Friendship Treaty signed between Paraguay and the United States in 1859 both of which include the obligation of the signatories to communicate the Consular Agents of the foreign country the detention of the latter's nationals.

Upon the fact that the Consular Agents of Paraguay had never been notified of the arrest of Paraguayan citizen Angel Breard, which obviously had an incidence in his conviction and sentence to capital punishment, it has been asserted the inapplicability of the death sentence and a new trial has been requested in which Mr. Breard may have the counsel of a lawyer of his choice within the rules of due process guaranteed by the Constitution of the United States of America.

The Government of Paraguay shall beseech the United States Department of State in order for its good offices to be entered in behalf of the petitions under review in order that a new trial may be granted Paraguayan citizen Angel Breard within the framework of constitutional guarantees for proper defense against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature.

I avail myself the opportunity to reassure Your Excellency of my highest esteem and consideration.

Jorge G. Prieto
Ambassador of Paraguay

United States Department of State

*Washington, D.C. 20520*

JUN 3 1997

Dear Mr. Ambassador:

Assistant Secretary Davidow has asked me to reply to your letter to him of December 10, 1996, in which you reviewed the case of Angel Francisco Breard Giubi, a Paraguayan national convicted of murder and sentenced to death in the Commonwealth of Virginia. You asked the Department to intervene in two different U.S. federal court proceedings with a view toward securing a new trial for Mr. Breard.

The United States values highly its long history of friendly relations with the Republic of Paraguay, and therefore has taken with utmost seriousness your request. The Department of State regrets, however, that it is not in a position to support the Government of Paraguay's petition for a new trial as you have requested, although we considered your request at length. I hope the brief discussion that follows will help your government understand our views on these matters.

The United States believes that the remedy for a breach of the consular notification obligation is through bilateral diplomatic discussions rather than litigation by the foreign government in U.S. courts of the type in *Republic of Paraguay, et al. v. George F. Allen, et al.* We do not believe that the Vienna Convention on Consular Relations or any other bilateral agreement between our two countries confers the right on your government to come into our domestic courts to attempt to enforce Convention rights.

For this reason, the United States has decided to file a brief as *amicus curiae* in the U.S. Court of Appeals for the Fourth Circuit in *Paraguay v. Allen*. I attach herewith a copy of our brief for your information. It represents the views of the U.S. government on several of the legal issues related to enforcement of treaty rights, but takes no view on the merits of the case against, or legal penalty assessed against, Angel Francisco Breard. I

The Honorable
Jorge J. Prieto,
Ambassador of the Republic of Paraguay,
Washington.

call your attention specifically to the discussion on pages 22 and 23, where we set forth our view that concerns relating to consular notification and access should be raised by governments in the first instance through diplomatic channels. In this connection, neither the Government of Paraguay nor the Government of Argentina pursued normal diplomatic remedies with respect to Mr. Breard's case before your government brought suit against the Commonwealth of Virginia. I also commend your attention to pages 26 and 27 of the brief, where there is a short discussion of our view that the bilateral treaty of Friendship, Commerce and Navigation does not confer the rights Paraguay has asserted in this court case.

Although we cannot support the views you have advanced in this litigation, we have had numerous discussions with officials of the Commonwealth of Virginia about the consular issues involved in this case, emphasizing the importance of the Article 36 obligations of consular notification and access. Because the possibility exists that a court may rule on whether the lack of consular notification in the Breard case was significant enough to warrant a judicial remedy, we do not believe it appropriate at this time for the Department to attempt independently to assess this question. At the same time, as suggested indirectly in our amicus brief, we do not rule out the possibility that, in an appropriate case, the Department might intercede with state authorities or seek other remedies to redress a breach of the Article 36 obligation to provide consular notification.

The Department of State looks forward to working with your Embassy and your government in the future in diplomatic channels to assist each other in respecting our mutual obligations to consular notification under the Vienna Convention.

Yours sincerely,

James Thessin

James H. Thessin
Deputy Legal Adviser

Attachment: As Stated.

Embassy of Paraguay
Washington, D.C.

EP/EUA/461/97

Washington D.C., June 3, 1997

Dear Ambassador Davidow:

The Government of Paraguay remains deeply interested in the fate of the Paraguayan citizen Angel Breard, mentioned in its note to you dated December 10, 1996, who is presently on death row in the Commonwealth of Virginia.

1. In its December 10 diplomatic note, Paraguay brought to the Department of State's attention the fact that Virginia officials had not complied with the Vienna Convention on Consular Relations and the Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of Paraguay by trying and sentencing to death Mr. Breard without informing him of his right to assistance by Paraguayan consular agents or informing Paraguayan consular agents of his detention. The note requested the State Department to use its good offices to seek a new trial for Mr. Breard in "strict fulfillment of the stipulations of international treaties" and at which the consular agents of Paraguay could provide the assistance they were denied at his first trial. To date, Paraguay has received no response to that note.

Paraguay reiterates its request that the United States intercede on its behalf to ensure that Mr. Breard's conviction and sentence is set aside and that Virginia officials afford him all rights due in any future proceedings against him. Paraguay would welcome any assistance the United States could provide in vindicating Paraguay's rights under the Vienna Convention and the FCN Treaty.

To the Honorable
Ambassador JEFFREY DAVIDOW
Assistant Secretary of State
for Inter-American Affairs
Department of State
Washington D.C.

COPY

2. Paraguay is aware that the United States has filed a brief amicus curiae in the court proceeding brought by Paraguay against Virginia officials, which is described in our diplomatic note of December 10, 1996. In its amicus curiae brief, the United States asserts that the United States is the party responsible for any treaty violations by state officials. U.S. Br. 15. The United States also points out that it has authority to enforce treaty obligations against states and municipalities. U.S. Br. 23.

The United States also asserts in its amicus brief that the appropriate forum for resolving Paraguay's request with respect to Mr. Breard, if diplomatic efforts fail, is not the United States courts, but the International Court of Justice pursuant to the optional protocol of the Vienna Convention. U.S. Br. 20, 14. The United States appears to equivocate on this point, however, as elsewhere in the brief it suggests that there may be no jurisdiction in the ICJ because the United States *agrees* with Paraguay that Vienna Convention rights should have been afforded Mr. Breard in the circumstances here. U.S. Br. 24 n.6; *see id.* 16 n.2.

3. For the reasons set forth in the papers submitted on its behalf in court proceedings, Paraguay believes that the United States courts have the authority and the obligation to remedy the treaty violations here. Our request which consider the United States Courts as competent to resolve our request is supported by the opinion of distinguished University professors from Harvard, Yale, Chicago and others as well by the International Union des Avocats, who filed amicus curiae briefs before the Court of Appeals of the Fourth District in Richmond, Virginia. Further, while Paraguay welcomes the confidence the United States displays in the ICJ, Paraguay believes that the United States courts should be afforded the opportunity to remedy the treaty violations here before the matter is permitted to reach the international plane. However, in the interest of expeditiously reaching the merits of this matter, and reserving all rights with respect to the pending court proceedings, Paraguay is prepared to accede to the United States' view that the ICJ is the appropriate forum.
Accordingly, Paraguay proposes that

a. the United States secure a stay of all proceedings in the action presently pending in the Court of Appeals, to which Paraguay would consent;

Embassy of Paraguay
Washington, D.C.

b. the United States and Paraguay submit this matter to the ICJ pursuant to the optional protocol with respect to the Vienna Convention claim (and an agreed submission with respect to the Friendship Treaty claim), and the United States waive any objections to the jurisdiction of the ICJ;

c. the United States ensure that no steps be undertaken to enforce Mr. Breard's conviction or carry out his execution, except that he shall remain in custody during the pendency of the action; and

d. the United States and Paraguay agree that the judgement of the ICJ be final and binding and that the United States ensure that it is carried out in all respects by responsible Virginia officials.

I avail myself of this opportunity to reassure Your Excellency of my highest esteem and consideration.

Jorge G. Prieto
Ambassador

United States Department of State

*Washington, D.C. 20520*

JUL - 7 1997

Dear Ambassador Prieto:

I am responding on behalf of the Department of State to your letter to Ambassador Davidow of June 3, 1997, concerning the matter of Mr. Angel Breard. Your letter was received at the same time that my letter to you of the same date concerning this case was delivered to your representatives. Your letter reiterates your government's earlier request that the United States intercede on behalf of Mr. Breard. It also again expresses the view that the courts of the United States have authority to remedy any violation of the obligation of consular notification that occurred with respect to his detention and discusses the alternative possibility of these matters being considered by the International Court of Justice.

We have previously assured your government that the United States places the highest value on ensuring respect for the consular notification obligation under Article 36 of the Vienna Convention on Consular Relations ("VCCR"). We deeply regret if such notification was not provided to Mr. Breard. After learning that Mr. Breard may not have been advised of his right to consular assistance, the Department reminded officials of the State of Virginia of the need to advise all alien detainees of this right. We have now had extensive discussions with such officials about how consular notification and access should be implemented.

Since receiving your June 3 letter, the Department has also reviewed in more detail the facts of Mr. Breard's case, with a particular focus on the consular notification issues raised by your government and the claim that a consular officer could have dissuaded Mr. Breard from believing that that he should confess in open court to the February 17, 1992, murder of Ruth Dickie and claim to have been under a "Satanic curse" imposed by his father-in-law. Attached for your information is a summary of the facts as we understand them. (If there is additional information that you believe we have not considered, we would be pleased to receive it.)

Our review has been informed by our understanding of the consular notification obligation. A primary purpose of consular notification is to permit a state to offer its nationals in a foreign country the benefit of consular services and protection. The actual extent of consular assistance will depend on the country concerned, its consular practices, and its resources in the host country. Under no circumstances, however, can a consular officer in the United States act as an attorney for an alien. Moreover, when an alien is arrested, he is subject to the laws of the host state, and consular protection cannot immunize him from those laws, the judicial system established to enforce them, or the penalties imposed for their violation. A consular officer instead generally seeks to ensure that the alien has appropriate legal representation and that his legal rights are respected. The consular officer may also attend to the alien's needs while imprisoned, and may communicate with the alien's family and friends, if necessary. The actual need for and provision of consular services will generally be less in

The Honorable
Jorge G. Prieto,
Ambassador of Paraguay,
Washington.

situations where an alien is well represented by attorneys and in direct touch with family and friends -- a situation most likely when the alien has been residing in the host country for a significant period. In some cases, an alien may decline consular notification, for privacy or other reasons, or because the alien does not consider consular assistance to be necessary.

While the obligation of consular notification is a serious one, in every country there are times when it is overlooked. U.S. diplomatic and consular officers raise issues of lack of consular notification with respect to U.S. nationals abroad, just as other countries' representatives raise similar concerns with the Department of State about aliens in the United States. Consular notification and access is a matter of continuous discussion between governments, which in our experience regularly review and if necessary enhance their efforts at compliance. Neither the VCCR text nor its negotiating record addresses how a failure to comply with the consular notification obligation must be remedied. We are aware of no state party to the VCCR that has a procedure for setting aside the results of its judicial process when there has been a failure to provide consular notification.

Having reviewed the facts in light of these considerations, we cannot accept that the lack of consular notification provides a basis for undoing Mr. Breard's conviction and sentence. It is entirely speculative, in any event, that a Paraguayan consul would have been intimately involved in Mr. Breard's trial and defense and would have convinced Mr. Breard to accept a plea bargain. Mr. Breard's attorneys were well positioned to advise him of the likely consequences of his confession in the State of Virginia, yet he would not accept their advice or the apparent advice of his mother to plead guilty. It is difficult to believe that a consular officer could have proven more persuasive.

Our review of these issues has reinforced our view that lawsuits between governments are not the appropriate means to enforce the consular notification obligation. We agree in particular with your assessment that this case is not one appropriate for resolution by the International Court of Justice. The reference to the VCCR Optional Protocol in our amicus brief was simply to illustrate that the state parties to the VCCR contemplated that issues under the VCCR would be addressed on a government-to-government basis, and certainly not by a government resorting to the domestic courts of another state party. We regret if that reference created any misunderstanding on this point. In any event, however, an ICJ proceeding is both costly and takes many years and extensive resources to pursue. It seems particularly inappropriate when there is no genuine dispute as to the requirements of consular notification and when the suggestion that consular notification in a particular case would have led to a different result is so speculative and implausible. Moreover, the ICJ would not have jurisdiction over Paraguay's asserted claims under the 1859 Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay, which is not relevant to these issues in any event.

In closing, I reiterate that the Department of State remains available to consider other relevant information, including information about Mr. Breard's case and about consular notification practice by Paraguay and other countries. In addition, we would welcome the opportunity to discuss with Paraguayan consular officers the general question of consular notification and access and how our respective countries can improve implementation of this obligation.

Sincerely,

James Thessin

James H. Thessin
Deputy Legal Adviser

# FACTS CONCERNING ANGEL BREARD

Mr. Breard is a dual Paraguayan-Argentinian national who came to the United States in 1986, originally as a student. He had been in the United States for roughly six years at the time he was arrested for Ruth Dickie's murder. He studied English when he first arrived here, and his command of English was sufficiently good that he acted as an interpreter in prison and did not require the assistance of an interpreter at trial. His trial attorneys have stated that they had no difficulty in communicating with him.

The State of Virginia cannot document that consular notification was given, but it is clear that Mr. Breard's family was quickly notified of his arrest and that others in Paraguay were also contacted. When he was first arrested, Mr. Breard asserted his right to an attorney and called his uncle. His mother testified on his behalf in the sentencing phase. In addition, Mr. Breard's attorneys have said that they were in touch with sources in Paraguay for information that might have assisted with his defense.

Mr. Breard's attorneys have also stated that they and his mother advised him to plead guilty. They have further stated that they advised Mr. Breard that his chances of being sentenced to death, rather than to life imprisonment, would be greater if he insisted on a trial and testified. As far as the courts have determined to date, Mr. Breard's attorneys were competent and he had the full panoply of due process protections guaranteed by the Constitution of the United States. These protections are among the most extensive provided by any state party to the VCCR.

Mr. Breard rejected the advice of his attorneys, refused to pursue a possible plea arrangement, and insisted on testifying at trial and at his sentencing hearing. The court was informed that Mr. Breard was testifying against the advice of counsel. He testified to the facts of the crime and claimed to have acted under a "Satanic curse" imposed by his father-in-law. During the sentencing phase, his testimony led to cross-examination that his trial attorneys have said had a negative effect on the jury.

Independently of Mr. Breard's testimony there was physical evidence that Mr. Breard attempted to rape and then brutally murdered Ruth Dickie on February 17, 1992. Blood, semen, and hair samples and DNA tests all pointed to Mr. Breard as the murderer. There was also evidence of significant aggravating factors to support imposition of the death penalty under Virginia law. The scene of the crime reflected the violence of Ruth Dickie's murder and the attempted rape that preceded it. Mr. Breard had attacked two other women, one before and one after Ruth Dickie's murder. Each attack was violent, and the second involved a sexual assault that was interrupted only because a neighbor called the police, who caught Mr. Breard with his victim. The arrest of Mr. Breard in the course of this assault led to Mr. Breard being charged with Ruth Dickie's murder.

It appears from these facts that Mr. Breard received the assistance that consular notification is designed to ensure. He had two attorneys and was in close touch with his family and others who might have helped him. Mr. Breard was a six-year U.S. resident who asked for an attorney when arrested; he apparently understood at least this basic tenet of the U.S. system reasonably well. In any event, however, he was clearly and repeatedly informed that it would not be to his benefit to plead not guilty and then to confess at trial.

# APPENDIX C

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

April 9, 1998

The Honorable James Gilmore
Governor of the Commonwealth of Virginia
State Capitol
Richmond, Virginia 23219

Dear Governor Gilmore:

On Friday, April 3, Paraguay brought a claim against the United States in the International Court of Justice based on the failure of Virginia authorities to inform Angel Breard, a national of Paraguay, of his right to contact Paraguay's consul following his arrest by Arlington police in 1992. Such notification is required by the Vienna Convention on Consular Relations, a treaty to which both the United States and Paraguay are parties. Mr. Breard was subsequently tried and convicted of murder and attempted rape in Virginia and is sentenced to be executed on April 14, 1998.

Paraguay requested that the Court urgently indicate provisional measures against the United States, seeking to delay Mr. Breard's execution pending full consideration of Paraguay's claim by the ICJ. Provisional measures are authorized under Article 41 of the statute of the court, which provides:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

The Court held a hearing at Paraguay's request for provisional measures on Tuesday, April 7. Lawyers from the U.S. Department of State, accompanied by a representative from the Department of Justice, vigorously contested Paraguay's request at the hearing. (Virginia was also invited to send a representative to take part in the April 7 hearing, but I understand that this was not possible due to the litigation in the United States related to Mr. Breard.)

Today the International Court of Justice has issued an order indicating provisional measures against the United States. Both the Virginia Commonwealth Attorney's office and David Anderson of your office have the order in hand. I attach a further copy as received from the Embassy in The Hague.

I request that you give consideration to the Court's indication of provisional measures.

Sincerely,

David R. Andrews

# APPENDIX D

*Article 36* (Communication and contact with nationals of the sending State) *(resumed from the 13th plenary meeting and concluded)*

43. The PRESIDENT recalled that the Conference had not adopted article 36 in the drafting committee's text. Two proposals for a new article 36 had been submitted, one by Czechoslovakia and the Ukrainian Soviet Socialist Republic (A/CONF.25/L.40) and the other by a group of seventeen delegations (A/CONF.25/L.41).[3] The first question for the Conference to decide was whether it wished to reconsider its earlier decision regarding article 36.

44. Mr. KRISHNA RAO (India) moved, under rule 33 of the rules of procedure, the reconsideration of proposals for inclusion as article 36 of the convention on consular relations.

45. The Conference had rejected a number of proposals regarding article 36 and it was now faced with the problem that none of the important matters dealt with in that article was covered in the draft convention. If the convention to be adopted by the Conference were to be silent on the subject of communication and contact with nationals of the sending State, it would be an admission of dismal failure.

46. As drafted by the International Law Commission, article 36 had dealt with the right of nationals of the sending State to communicate with and to have access to their consulate, with the rights of consular officers in that regard and with the important consular rights relating to persons who were in prison, custody or detention. It was therefore essential that the Conference should consider the drafting of an article 36, taking into consideration the proposals before it.

47. Mr. PETRŽELKA (Czechoslovakia) supported the Indian motion for reconsideration.

*The motion was carried by 71 votes to none, with 6 abstentions.*

48. Mr. AVILOV (Union of Soviet Socialist Republics) explained that his delegation had abstained from voting on the motion for reconsideration. Article 36 had been clearly rejected by the Conference because, for a number of reasons, some of its provisions were not acceptable to a considerable number of States. His delegation believed that it would be unwise to endeavour to make an effort at that late stage of the Conference, when it was pressed for time, to find a satisfactory solution likely to meet with the approval of the Conference. He understood the concern of certain delegations to include in the convention on consular relations provisions covering the matters dealt with in article 36, but unfortunately he saw no practical possibility of a satisfactory result being achieved in that respect, in view of the pressure of time and of the differences of opinion. A hasty decision would be worse than no decision at all. It was preferable not to adopt any such provision as article 36; instead, the Conference might either adopt an optional protocol on its subject matter, as had been done for acquisition of nationality, or else leave the matter to be settled by bilateral agreements between States in accordance with the existing practice.

49. International practice had evolved satisfactory solutions for the situations which article 36 purported to cover. His delegation therefore felt that the matter could be left as it stood.

50. Mr. DEJANY (Saudi Arabia) said that his delegation regretted that it had been unable to vote for the motion for reconsideration because the proposals which had been introduced for reconsideration were the same as those which had been rejected in committee and in the plenary and were against the interests of his country. If there had been a compromise proposal to accommodate the various points of view expressed at the Conference his delegation would have gladly given its support. Unfortunately, however, no compromise solution had appeared. There appeared to be little or no prospect that reconsideration of the matter would have any better result than the earlier discussion which had led to the rejection of draft article 36.

51. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) introduced the proposal of Czechoslovakia and the Ukrainian SSR for the reconsideration of article 36. The discussion in the Second Committee and the plenary had shown that the rules of international law on the subject matter of article 36 were not yet sufficiently for codification and for progressive development. However, in view of the Conference's decision to reconsider article 36, his delegation and that of Czechoslovakia proposed that the new discussion should take place on the basis of the text drafted by the International Law Commission. That text was the fruit of many years of work by a body of leading jurists representing the world's different legal systems and took into account the peculiarities of the various national laws. It was therefore appropriate that, once again, it should form the basis for the Conference's discussion.

52. The International Law Commission's text contained adequate and detailed provisions to ensure communication and contact between the consul and his nationals in the receiving State; in addition, it guaranteed the right of consular officers to contact their nationals in pursuance of their functions and gave them the necessary facilities in that respect.

53. A great advantage of the International Law Commission's text by comparison with other texts which had been submitted both in the Second Committee and in plenary meeting, was that its provisions on implementation wisely combined the rules set forth in paragraph 1 with a reference to the observance of the laws and regulations of the receiving State. Very properly, paragraph 2 did not contemplate the provisions of paragraph 1 on the one hand and the laws and regulations of the receiving State on the other as being in opposition to each other, but envisaged rather that they should be combined in their application. It was undesirable to speak of the primacy either of the law of the receiving State or of international law, especially

[3] This proposal was sponsored by Algeria, Ceylon, Congo (Brazzaville), Congo (Leopoldville), Guinea, India, Indonesia, Iran, Lebanon, Liberia, Mali, Nigeria, Pakistan, Republic of Korea, Sierra Leone, Tunisia and Upper Volta.

the provisions of article 36. In that respect, the text sponsored by his delegation and that of Czechoslovakia offered a happy solution by taking into account national peculiarities and different forms of government. The two sponsors of the amendment did not close the door to compromise, provided that it was without prejudice to the principles involved.

54. Mr. BOUZIRI (Tunisia), introducing the seventeen-power proposal, said that it reproduced in substance the text which had been approved by the Second Committee and which had been almost adopted by the Conference. However, some changes had been introduced in order to meet certain criticisms which had been made of the article as approved in the Second Committee.

55. In the first place, the former sub-paragraph (*c*) of paragraph 1 had been dropped because the obligation to communicate lists of arrested persons had appeared to many delegations to impose an unduly heavy burden upon the authorities of the receiving State. In addition, it had been thought by some that the provisions of that sub-paragraph were unnecessary in view of the provisions of sub-paragraph (*b*) which specified that the competent authorities of the receiving State had to inform a consulate without delay of the arrest of one of its nationals.

56. As far as sub-paragraph (*b*) was concerned, the sponsors had introduced the initial proviso " unless he expressly opposes it ", thereby relieving the receiving State of the automatic duty to inform the consul of the arrest of the person concerned. The reason for that proviso was the need to take into consideration the prisoner's own freedom of choice. It had been argued that in some cases a prisoner might not wish the consul to know that he had been in prison. The sponsors had hesitated at first; they had, however, ultimately agreed to take that point into account, but with appropriate safeguards. It was for that reason that the proviso was so drafted that the duty to notify would exist unless the person concerned explicitly stated that he did not wish the consul to be advised.

57. A second change had been made in sub-paragraph (*b*) as adopted by the Second Committee: the sponsors of the joint proposal had deleted the passage which would have required the receiving State to indicate the reasons for the arrest of the national of the sending State. In the opinion of many delegations the application of that provision might have involved interference in the internal affairs of the receiving State. In addition, many delegations had felt that such a provision might interfere with the investigation of the case because the reasons indicated at the earliest stage for the arrest might well not prove to be the reasons for the continued detention and, possibly, for the conviction of the person concerned.

58. He urged delegations to support the proposal, which adequately safeguarded individual freedom and the exercise of consular functions.

59. Mr. de MENTHON (France) agreed with the Indian representative that it would be a lamentable failure on the part of the Conference not to adopt a provision on the subject matter of article 36. It would be inconceivable for the Conference to adopt a convention on consular relations which did not contain an article on the essential matter of the protection of the nationals of the sending State and in particular the protection of those who needed it most because they were in prison, custody or detention. His delegation regretted that some of the provisions adopted by the Second Committee should have been dropped from the joint proposal, particularly since one of those provisions originated in an amendment submitted by the French delegation. However, he was prepared to support at that stage the seventeen-power proposal provided it was amended as proposed in the joint amendment (A/CONF. 25/L.49).

60. Mr. KAMEL (United Arab Republic), introducing the joint amendment (A/CONF.25/L.49) on behalf of its sponsors,[3] welcomed the Conference's decision to reconsider article 36 and the prospect of an appropriate provision being adopted in the convention. In the Second Committee, his delegation had been one of the twenty-seven delegations which had abstained when the Second Committee had adopted an amended text of article 36. The reason for that abstention had been that the provisions of paragraph 1 (*b*) as then drafted were very weak. It had been the hope of his delegation that the Conference in plenary would reconsider the matter, and its expectations had been fulfilled.

61. The Conference was faced with a new situation: as yet, it had not adopted an article on communication and contact between the consulate and nationals of the sending State. To fill that gap, there were two proposals before the Conference. That submitted by Czechoslovakia and the Ukrainian SSR would reintroduce the text of the International Law Commission which had been amended after lengthy discussion in the Second Committee. Most delegations had not changed their points of view on the issues involved, and his own delegation could not possibly accept a return to the International Law Commission's text.

62. The seventeen-power proposal did not contain the original sub-paragraph (*c*) of paragraph 1 which had been the object of considerable criticism. However, it maintained sub-paragraph (*b*), which was not acceptable to many delegations and, for that reason, the sponsors of the joint amendment proposed that the opening words of that sub-paragraph " unless he expressly opposes it " should be replaced by " if he so requests ". The purpose of the amendment was to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to pressure of work or to other circumstances, there was a failure to report the arrest of a national of th

[3] Canada, Ceylon, Congo (Brazzaville), Congo (Leopoldville), Ecuador, Federation of Malaya, Guinea, India, Indonesia, Japan, Liberia, Mali, Pakistan, Philippines, Republic of Korea, Sierra Leone, Syria, Thailand, United Arab Republic, Venezuela.

sending State. Also, by stating that the consul should be notified if the national of the sending State so requested, the amendment would avoid misunderstanding between the consulate and the authorities of the receiving State. It would thus serve one of the purposes of the convention on consular relations, which was to ensure that understanding and harmony should prevail in the relations between the receiving State and the sending State.

63. Mr. TILAKARATNA (Ceylon), replying to a question by Mr. EL KOHEN (Morocco), explained that his delegation, one of the sponsors of the seventeen-power proposal, had joined in sponsoring the joint amendment in a spirit of compromise. Like other sponsors of the seventeen-power proposal who had done the same, it had reconsidered the matter with the object of arriving at a satisfactory compromise solution.

64. Mr. TSHIMBALANGA (Congo, Leopoldville) and Mr. BARNES (Liberia) said that their position was similar to that of the representative of Ceylon.

65. Mr. SILVEIRA-BARRIOS (Venezuela) said that he agreed with the arguments put forward by the representative of the United Arab Republic. His delegation, like many others, attached great importance to the subject matter of article 36. He appealed to the sponsors of the seventeen-power proposal and to the other delegations to accept the joint amendment which offered the prospect of a satisfactory compromise solution. Approval of the amendment would ensure the adoption of an article 36 worthy of the Conference.

66. Mr. SICOTTE (Canada), speaking as one of the sponsors of the joint amendment (A/CONF.25/L.49), congratulated the delegation which had made it possible to put it forward as a compromise solution that he hoped would meet with the approval of the Conference.

67. He pointed out that, in the view of the sponsors of the joint amendment, sub-paragraph (*b*) of paragraph 1 of the seventeen-power proposal would impose an unduly onerous obligation on the police and other authorities of the receiving State by requiring those authorities to inform the consulate of every arrest of a national of the sending State unless that national expressly objected to that notification.

68. Mr. TILAKARATNA (Ceylon) explained that at the 13th plenary meeting his delegation had voted against the adoption of the remainder of article 36 because, after the deletions made to that article, the text had become too vague. As a country which was mainly a receiving State in the matter of consular relations, Ceylon would have been content if the convention had lacked a clause dealing with the subject of article 36, which would place certain onerous responsibilities upon its authorities. However, acting in the interests of the Conference as a whole, his delegation had joined in sponsoring the joint amendment (A/CONF.25/L.49), the adoption of which would ensure the incorporation into the convention on consular relations of an article on communication and contact with nationals of the sending State, which should prove acceptable to all.

69. Mr. BARTOŠ (Yugoslavia) stressed the importance of the subject matter of article 36, dealing with one of the traditional duties of a consul, which was to protect nationals of a sending State who were in difficulties in a foreign country. In view of the importance which his delegation attached to the matter, it had been naturally very concerned at the failure of the Conference to adopt an article 36. Accordingly, it welcomed the two proposals (A/CONF.25/L.40 and L.41) to fill the gap.

70. He would refrain from entering into the details of what was an extremely complex and difficult subject and would confine his remarks to stating his preference for the proposal of Czechoslovakia and the Ukrainian SSR. That proposal would introduce into the convention on consular relations the text originally adopted by the International Law Commission, a text which his government had instructed him to support. Nevertheless, if the Conference, contrary to the wishes of his delegation, were to reject the proposal of Czechoslovakia and the Ukrainian SSR, his delegation would vote in favour of the seventeen-power proposal because it preferred a less satisfactory text to the total absence of a provision on the subject. That proposal should, however, be amended as proposed by the United Kingdom, for in that way the proposed provisions would become more effective.

71. Mr. EVANS (United Kingdom) observed that the proposal of Czechoslovakia and the Ukrainian SSR reproduced the International Law Commission's text which the Second Committee had found unsatisfactory in a number of respects. That text contained several expressions which weakened to an unacceptable degree the basic rights and obligations which article 36 sought to safeguard. He referred, in particular, to the use of the expression " in appropriate cases " in paragraph 1 (*a*) and the word " undue " before " delay " in paragraph 1 (*b*), both of which the Second Committee had very rightly deleted. In addition, the proposed text reproduced paragraph 2 in the very unsatisfactory form in which it had been decisively rejected by the Conference itself in plenary meeting.

72. In order to ensure the effective implementation of the obligations relating to the protection of nationals, his delegation preferred that those obligations should be stated in the unequivocal terms adopted by the Second Committee. Accordingly, he found the seventeen-power proposal generally acceptable; its terms were largely similar to those adopted by the Second Committee.

73. However, the text of that proposal differed from the one adopted by the Second Committee in one important respect: the inclusion in paragraph 1 (*b*) of the proviso " unless he expressly opposes it ". As it had said in the discussions in the Second Committee, his delegation preferred the statement of an unequivocal obligation and did not favour a qualification of any kind. Nevertheless, it had carefully considered both the proviso embodied in paragraph 1 (*b*) of the seventeen-power proposal and the alternative one in the joint amendment (A/CONF.25/L.49). The language of the latter was unacceptable as it stood, because it could give rise to abuses and misunderstanding. It could well make the provisions of article 36 ineffective because

the person arrested might not be aware of his rights. There could also be misunderstandings owing to language and other difficulties. For those reasons, his delegation considered that if the obligation set forth in paragraph 1 (*b*) were to be qualified in the manner proposed by the sponsors of the joint amendment it was essential to introduce a provision to the effect that the authorities of the receiving State should inform the person concerned without delay of his rights under sub-paragraph (*b*). That was the purpose of his delegation's amendment (A/CONF.25/L.50).

74. If the Conference preferred the proviso proposed in the joint amendment " if he so requests ", his delegation would thus be prepared to accept it on the condition that the United Kingdom amendment was also accepted. Since his delegation would be prepared to vote for the seventeen-power proposal and for the joint amendment if its own amendment were accepted, he urged the sponsors of both texts to agree that the United Kingdom amendment should be voted upon first.

75. Mr. MEYER-LINDENBERG (Federal Republic of Germany) said his delegation attached the greatest importance to article 36; without it, the convention would be unsatisfactory and incomplete. He would have preferred the text approved by the Second Committee, but it had been rejected by the plenary meeting. In the circumstances, the joint proposal offered a reasonable compromise and he would vote in favour of it and also of the amendments thereto.

76. Mr. DE CASTRO (Philippines) said that there were three possibilities before the Conference: to place an unequivocal obligation of the receiving State to notify the consular post of the receiving State of the arrest, imprisonment or detention of a national of the sending State; to provide that the receiving State should notify the consulate only if requested by the person concerned; or to make it incumbent on the receiving State to notify the consular post unless the national concerned expressly opposed it. He strongly supported the joint amendment (A/CONF.25/L.49). If it were not adopted, however, he would propose a separate vote on the first sentence of paragraph 1 (*b*) of the two proposals (A/CONF.25/L.40 and L.41). The sentence had the same meaning in both cases and he would like it to be deleted. The remaining text would represent a reasonable compromise between the differing points of view and would reinforce the rights and principles set forth in paragraph 1 (*a*).

77. Mr. GIBSON BARBOZA (Brazil) shared the views of the representative of India. It would be inconceivable to draft a convention which did not include a provision of the kind contemplated in article 36. He had doubts whether any of the proposals before the meeting represented a real effort at compromise, for the concessions made did not go far enough. Nevertheless, he would vote in favour of any of them that were put to the vote rather than see the convention without the article at all.

78. Mr. LAHAM (Syria) said he could not conceive of a convention which provided the first international codification of the law concerning consular relations and which did not make provision for free communication between consular officials and nationals of the sending State, on the lines proposed by the International Law Commission in article 36. It was unfortunate that the divergence of opinion had led to the deletion of the article — a situation which he was sure no delegation had intended. He had sponsored the joint amendment (A/CONF.25/L.49) in an effort to help the Conference to write a convention that would be acceptable to all States. He supported the representative of Venezuela in urging the adoption of the amendment.

79. Mr. ATABAKI (Iran) said he had joined the sponsors of the seventeen-power proposal for the reasons so lucidly explained by the representatives of India and Tunisia. He could accept the joint amendment.

80. Mr. REZKALLAH (Algeria), speaking as one of the sponsors of the seventeen-power proposal, supported the joint amendment and the United Kingdom amendment for the reasons given by the representatives of India, Czechoslovakia and the United Kingdom. He was not in favour of the proposal of Czechoslovakia and the Ukrainian SSR, though he would support it if the other proposal was not adopted.

81. Mr. CRISTESCU (Romania) said he could not agree to the inclusion in the convention of any provision that would affect criminal procedure and put aliens in a better position than nationals. The seventeen-power proposal would restore some provisions that the Conference had rejected earlier: in particular, it would restore the whole of paragraph 2 as approved by the Second Committee, which had prevented many representatives from voting in favour of article 36 in the plenary. The convention was concerned with consular privileges and immunities and not with national laws. No receiving State could admit interference in its internal judicial affairs and article 36 was unnecessary: articles 5 and 27 A provided all that was necessary to enable the consul to carry out his duty to protect his fellow nationals in the receiving State. He would vote against the seventeen-power proposal.

82. Mr. MARAMBIO (Chile) said that article 36 as drafted by the International Law Commission embodied all the basic ideas that such a provision should contain, namely: the right of communication between the consular officer and the nationals of his country; the guarantee that the consular officer would be notified without delay if one of his nationals was deprived of his freedom in the receiving State; and the right of a consul to visit a national under detention in that State. The text approved by the Second Committee, which retained the basic structure of the International Law Commission's draft, had been rejected in plenary, after long discussion and after suffering severe mutilation. But, as he and many other representatives agreed, a convention of the kind being drafted, which codified universal rules for consular relations, should contain an article setting out the basic ideas contained in article 36 as drafted by the International Law Commission; and for that reason several proposals had been submitted to the Conference.

83. He did not find the texts fully satisfactory; but as it was essential to fill the serious gap which at the moment existed in the draft convention, he was ready to support any proposal for including in the convention a text which was as close as possible to the International Law Commission's draft and which would specify the three basic rights he had mentioned. He hoped the Conference would make a real effort to restore article 36 in a satisfactory form; its absence would be a permanent reflection on the Conference.

84. Mr. BOUZIRI (Tunisia) agreed with the representative of Chile. He regretted that he could not accept the joint amendment as it was not a compromise: it reproduced a phrase which had been rejected by the Second Committee and by the plenary meeting. Article 36 was important but it should be acceptable to the greatest possible number of States, particularly on the point in question. The joint amendment (A/CONF.25/L.49) removed one of the fundamental obligations of the receiving State; it would deny to the consul the means of performing one of his most important functions under article 5 and frustrate the national's right to protection from his consulate, for the decision to notify the consul of a national's detention in the receiving State would be left entirely to the discretion of that State's authorities. The United Kingdom amendment would in no way improve the situation. He did not agree with the argument that a positive obligation would place an excessive burden on the receiving State, for in practice there were very few cases where a national would not want his consul to be notified of his detention. He would vote against the joint amendment and, if it should be adopted, he would vote against the whole article. It would be better to shelve the question than to deal with it in an unsatisfactory way.

85. Mr. TSHIMBALANGA (Congo, Leopoldville) supported the representative of Ceylon. The Conference should adopt some provision on the subject, for it was too important to be passed over in silence. None of the proposals was entirely satisfactory, but he would join the majority in order to reach a compromise. He would support the United Kingdom amendment.

86. Mr. MARESCA (Italy) said it was essential that the convention should contain a provision on so important a matter as communication and contact between the consulate and nationals of the sending State. Although it would not entirely dispel the doubts expressed during discussion, the seventeen-power proposal was acceptable. He did not support the joint amendment and if it were adopted he would vote for the United Kingdom amendment.

87. Mr. KALENZAGA (Upper Volta) said that, although he had supported the text approved by the Second Committee, he had now sponsored the seventeen-power proposal. In a spirit of compromise, he would also vote for the joint amendment provided that the United Kingdom text was also adopted.

88. Mr. JAYANAMA (Thailand) said that he had fully explained his delegation's position in the debate in the Second Committee. Article 36 was one of the most important in the convention, and he had become a sponsor of the joint amendment in a spirit of compromise; he particularly supported the arguments of the representatives of the United Arab Republic, the Philippines and Canada. He opposed the proposal submitted by Czechoslovakia and the Ukrainian SSR, and he also opposed the United Kingdom amendment.

89. Mr. AVILOV (Union of Soviet Socialist Republics) said that none of the texts before the Conference were satisfactory to all representatives. The seventeen-power proposal reproduced a text which the Conference had previously rejected; his delegation would like an article 36 to be included in the convention but could not accept that proposal as it would infringe the sovereign rights of the receiving State. In his opinion, the best text was that prepared by the International Law Commission, but he realized that some of its provisions were not acceptable to other delegations. The Conference should try to find a solution acceptable to all delegations; otherwise the convention would not receive a sufficient number of ratifications. It would be better to have no provision than an unsatisfactory one.

90. Mr. PAPAS (Greece) expressed general support for the seventeen-power proposal but reserved his position on the first sentence of paragraph 1 (*b*). The receiving State's obligation should be unqualified, to avoid the risk of authorities failing in their duty on some pretext. He requested a separate vote on the sentence in question.

91. Mr. AMLIE (Norway) said that paragraph 1 of the proposal by Czechoslovakia and the Ukrainian SSR, which reproduced the International Law Commission's text, was satisfactory, but paragraph 2 contained no provision for the enforcement of the provisions of paragraph 1. In that respect, the seventeen-power proposal was better, though it was not entirely satisfactory; he was not, for example, satisfied that the duty to report the detention of a national of the sending State in the receiving State should be made subject to that person's wishes. Since, however, it seemed that an article imposing an absolute obligation on the receiving State would not obtain the necessary two-thirds majority in the Conference, he would have to accept the qualification. He would only support the seventeen-power proposal, however, if it was amended in the manner proposed by the United Kingdom, which should be voted on first.

92. Mr. MAHOUATA (Congo, Brazzaville) said that article 36 was of the greatest importance, as it concerned one of the most vital consular functions. He had been greatly disturbed at the deletion of the article, which had left a serious gap in the convention. He had therefore sponsored the seventeen-power proposal and hoped it would help the Conference to find a satisfactory way out of the difficulty.

93. Mr. CAMARA (Guinea) said he had voted in favour of article 36 as approved by the Second Committee and he regretted its rejection in the plenary. In a spirit of compromise he had become a sponsor of the

APR-10-98 14:20 FROM:LEGAL TO:736755 PAGE 7/8



seventeen-power proposal. He supported the United Kingdom amendment, which would strengthen the text.

94. Mr. N'DIAYE (Mali), also speaking as a sponsor of the seventeen-power proposal, said it was essential that the convention should contain an article dealing with one of the principal consular functions.

95. Mr. PETRŽELKA (Czechoslovakia) said that his delegation and that of the Ukrainian SSR were willing to seek a compromise solution with the sponsors of the seventeen-power proposal. In the short time available, it was difficult to consider all the suggestions made during the discussion, but he would agree to delete the first sentence of paragraph 1 (*b*) of the Czechoslovak and Ukrainian proposal (A/CONF.25/L.40). The International Law Commission's text, on which that proposal was based, was well balanced, and was itself the result of compromise; to depart from it too far would lead to the risk of conflict with national laws. He was therefore unable to support any of the other amendments. He urged that the dignity of the Conference should not be impaired by hasty voting on an important matter.

96. Mrs. VILLGRATTNER (Austria) said that the provisions of article 36 were an essential part of the convention, and she would vote for the seventeen-power proposal and for the amendments thereto. In whatever form it was adopted, article 36 would not hinder the application of the well-established principles of international law set out in the preamble to the convention: it would be subordinate to the free will of the individual.

97. Mr. KRISHNA RAO (India) said the seventeen-power proposal as amended by the United Kingdom would constitute the best text in the circumstances. It was essential to restore article 36.

98. The PRESIDENT said he would put the proposal by Czechoslovakia and the Ukrainian SSR to the vote first, as it had been submitted first.

99. Mr. RUEGGER (Switzerland) said that, although he had not taken part in the discussion during the current meeting, he attached the greatest importance to article 36 and to its inclusion in the convention. He urged that the seventeen-power proposal should be voted on first, so that if it were rejected the Conference would still have the International Law Commission's text, proposed by Czechoslovakia and Ukraine, to fall back on. If the seventeen-power proposal did not obtain the necessary two-thirds majority, the Conference should not give the impression that it regarded as unacceptable a text which the eminent jurists of the International Law Commission had considered for so long.

100. Mr. PETRŽELKA (Czechoslovakia) pointed out that the first sentence in paragraph 1 (*b*) of the proposal sponsored by his delegation and that of the Ukrainian SSR had been withdrawn. He considered that his amendment should be put to the vote first.

101. Mr. EL KOHEN (Morocco) said that the discussion had shown that there were points of agreement between the various proposals and that the differences were small. He suggested that voting should be postponed to the following meeting so that the sponsors could meet and work out a compromise.

102. Mr. RUEGGER (Switzerland) Mr. PETRŽELKA (Czechoslovakia) and Mr. BOUZIRI (Tunisia) supported the suggestion.

103. Mr. CAMERON (United States of America) said that the Conference had voted on the article once before and since then had had prolonged discussions on its subject matter. It had a long discussion at the current meeting and every delegation had had full opportunity to speak. He urged that the vote should take place forthwith. If the result was unsatisfactory, the sponsors could meet the following day as suggested by the representative of Switzerland, and he would be very glad to be present. But it would be unreasonable to postpone the vote at that juncture.

104. Mr. KAMEL (United Arab Republic) and Mr. TSHIMBALANGA (Congo, Leopoldville) agreed with the United States representative.

105. Mr. RUEGGER (Switzerland), in reply to a question from the PRESIDENT, said that if the meeting was going to vote, he would maintain his request that the proposal by Czechoslovakia and the Ukrainian SSR should be voted on last, for the reasons he had already given.

106. Mr. PETRŽELKA (Czechoslovakia) agreed that the Czechoslovak and Ukrainian proposal should be put to the vote after the other proposals before the Conference.

107. Mr. EVANS (United Kingdom) asked that his delegation's amendment should be voted on before the joint amendment.

108. The PRESIDENT invited the Conference to vote on the United Kingdom amendment.

*At the request of the representative of the United Arab Republic, a vote was taken by roll-call.*

*Liechtenstein, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Liechtenstein, Luxembourg, Mali, Mexico, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Poland, Portugal, Romania, Sierra Leone, Sweden, Switzerland, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Upper Volta, Uruguay, Venezuela, Republic of Viet-Nam, Yugoslavia, Albania, Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Ceylon, Chile, China, Colombia, Congo (Brazzaville), Congo (Leopoldville), Costa Rica, Denmark, Dominican Republic, El Salvador, Federation of Malaya, Finland, France, Federal Republic of Germany, Ghana, Greece, Guinea, Holy See, Hungary, India, Iran, Ireland, Italy, Republic of Korea, Lebanon, Liberia.

*Against:* Mongolia, Thailand.

APR-10-98 14:20 FROM:LEGAL TO:736755S PAGE 8/8



*Abstaining:* Morocco, Philippines, San Marino, Saudi Arabia, South Africa, Spain, Tunisia, Cuba, Czechoslovakia, Ethiopia, Indonesia, Japan, Libya.

*The United Kingdom amendment (A/CONF.25/L.50) was adopted by 65 votes to 2, with 13 abstentions.*

109. The PRESIDENT invited the Conference to vote on the joint amendment (A/CONF.25/L.49).

*At the request of the representative of Mali, a vote was taken by roll-call.*

*Lebanon, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Liberia, Liechtenstein, Luxembourg, Mali, Mexico, Morocco, Netherlands, New Zealand, Pakistan, Panama, Peru, Philippines, San Marino, Sierra Leone, South Africa, Sweden, Switzerland, Syria, Thailand, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Upper Volta, Uruguay, Venezuela, Republic of Viet-Nam, Argentina, Australia, Austria, Brazil, Cambodia, Canada, Ceylon, Chile, China, Colombia, Congo (Brazzaville), Congo (Leopoldville), Costa Rica, Denmark, Dominican Republic, El Salvador, Ethiopia, Federation of Malaya, France, Federal Republic of Germany, Ghana, Guinea, Holy See, India, Indonesia, Iran, Ireland, Japan, Republic of Korea.

*Against:* Lebanon, Mongolia, Norway, Poland, Portugal, Romania, Spain, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia, Albania, Algeria, Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Finland, Hungary, Italy.

*Abstaining:* Libya, Saudi Arabia, Turkey, Belgium, Greece.

*The joint amendment (A/CONF.25/L.49) was adopted by 55 votes to 20, with 5 abstentions.*

110. Mr. PETRŽELKA (Czechoslovakia) moved that a separate vote be taken on the last sentence of paragraph 1 (*c*) of the seventeen-power proposal.

111. Mr. CAMERON (United States of America) opposed the Czechoslovak motion.

112. Mr. USTOR (Hungary) supported the motion.

*The Czechoslovak motion was defeated by 58 votes to 12, with 9 abstentions.*

*The seventeen-power proposal (A/CONF.25/L.41), as amended, was adopted by 64 votes to 13, with 3 abstentions.*

113. Mr. DEJANY (Saudi Arabia) said he had abstained from voting on all the proposals. His delegation accepted the principle in article 36 as adopted, but reserved its position with regard to paragraph 1 (*b*). His country would conform to that provision, but in the time which was practicable in the particular circumstances.

114. Mr. AVILOV (Union of Soviet Socialist Republics) said he had voted against the seventeen-power proposal, since article 36 in that form was absolutely unacceptable to his delegation for reasons which he had explained in the course of the discussion.

115. Mr. PETRŽELKA (Czechoslovakia) said he had voted against the revised text of article 36 because it did not provide a sound basis for the development of customary international law. He had abstained from voting on the United Kingdom amendment — although it proposed a perfectly reasonable provision — because the priority given to the vote on that amendment was contrary to rule 41 of the rules of procedure.

116. Mr. CRISTESCU (Romania), Mr. NESHO (Albania), Mr. KONSTANTINOV (Bulgaria), Mr. AVAKOV (Byelorussian Soviet Socialist Republic) and Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that they had voted against the article as revised because it was totally unacceptable to their delegations.

The meeting rose at 7.45 p.m.

## TWENTY-FIRST PLENARY MEETING

*Monday, 22 April 1963, at 10.45 a.m.*

*President:* Mr. VEROSTA (Austria)

**Consideration of the question of consular relations in accordance with resolution 1685 (XVI) adopted by the General Assembly on 18 December 1961 (*continued*)**

[Agenda item 10]

DRAFT CONVENTION

*Article 72* (Settlement of disputes)

*Proposal for an Optional Protocol concerning the Compulsory Settlement of Disputes*

1. The PRESIDENT invited the Conference to consider article 72 (Settlement of disputes). No amendments had been proposed to that article but the Conference had before it a joint proposal (A/CONF.25/L.46) put forward by twenty delegations for an optional protocol concerning the compulsory settlement of disputes, as an alternative to the inclusion of article 72.

2. Mr. KRISHNA RAO (India), introducing the joint proposal on behalf of its sponsors, said that in the First Committee a sort of public opinion poll had been conducted by means of a roll-call vote on article 72.[1] The result of that vote had been described by some as a victory of the ideals of justice. The vote in question had placed in an awkward and embarrassing position many countries which had accepted the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Court's statute.

3. The impression had been created that the Court was a perfect instrument for the purpose of deciding all legal disputes and that any criticism of the Court should not be tolerated. He could fully understand the attitude of some European countries which genuinely placed their faith in the Court. However, he could not accept

[1] For the discussion of this question in the First Committee, see the summary records of the twenty-ninth, thirtieth, and thirty-first meetings of that committee.

APR-10-98 09:53 FROM:LEGAL ID:7367559 PAGE 2/14



sentence of paragraph 6 might read "... to take possession of the consular bag directly and freely from the captain of the ship or aircraft ".

23. Mr. EVANS (United Kingdom) said that a fairly important drafting point was involved. It might be better to refer to " merchant ship ". He would suggest that the drafting committee should be asked to consider the matter.

24. The CHAIRMAN said that the drafting committee would bring the whole article into agreement with the amendments adopted by the Committee.

25. He put to the vote the oral amendment submitted by the delegation of Chile, to add after the word " captain " in the first sentence of paragraph 6 the words " or an authorized official ".

*The amendment was rejected by 39 votes to 13, with 18 abstentions.*

26. The CHAIRMAN put to the vote the South African amendment to paragraph 6 (A/CONF.25/C.2/L.75) as orally revised.

*The amendment was adopted by 26 votes to 10, with 34 abstentions.*

27. The CHAIRMAN put to the vote paragraph 6 as amended, which would become the new paragraph 7.

*Paragraph 6, as amended, was adopted by 66 votes to none, with 5 abstentions.*

*Article 35 as a whole, as amended, was approved by 52 votes to 1, with 17 abstentions.*

*Article 36* (Communication and contact with nationals of the sending State)

28. The CHAIRMAN invited the Committee to consider article 36 and the amendments presented to it.[1] He announced that the amendment submitted by the delegation of Thailand (L.65) had been replaced by an amendment (L.101) to delete sub-paragraph (*b*) of paragraph 1. In addition to the written amendments, two further amendments had been presented to the Chair. The first, submitted by the delegation of India, was to delete the words " in appropriate cases " in paragraph 1, sub-paragraph (*a*). The second, submitted by the delegation of Australia, was to delete the same words in that sub-paragraph and to insert the words " subject to the wishes of the person concerned ".

29. In the interests of orderly discussion, he suggested that article 36 should be examined paragraph by paragraph and that paragraph 1 should be examined sub-paragraph by sub-paragraph.

*It was so agreed.*

[1] The following amendments had been submitted: United States of America, A/CONF.25/C.2/L.3; Belgium, A/CONF.25/C.2/L.25; Japan, A/CONF.25/C.2/L.56; Thailand, A/CONF.25/C.2/L.65; Federal Republic of Germany, A/CONF.25/C.2/L.74; Switzerland, A/CONF.25/C.2/L.78; Venezuela, A/CONF.25/C.2/L.100; United Kingdom, A/CONF.25/C.2/L.107; Spain, A/CONF.25/C.2/L.114; Greece, A/CONF.25/C.2/L.125. As explained above (para. 28), the amendment by Thailand was replaced by the amendment contained in document A/CONF.25/C.2/L.101.

*Paragraph 1 (a)*

30. The CHAIRMAN invited the Committee to consider the International Law Commission's text of paragraph 1, sub-paragraph (*a*), together with the amendment presented by the delegation of Venezuela (L.100), and the oral amendments submitted by the delegations of Australia and India.

31. Mr. ALVARADO GARAICOA (Ecuador) suggested that the text of paragraph 1, sub-paragraph (*a*), would be improved by the deletion of the redundant word " consular " in the phrase " the consular officials of that consulate ".

32. Mr. PEREZ-CHIRIBOGA (Venezuela) explained that in presenting its amendment (L.100), his delegation had no intention of interfering in any way with the right of consular officials to have access to the nationals of the sending State. The objection to the International Law Commission draft was mainly one of form. The opening statement of sub-paragraph 1 (*a*), concerning the right of the nationals of the sending State to communicate with and to have access to the competent consulate, was inappropriate in a convention on consular relations. The Government of Venezuela considered that foreign nationals in the receiving State should be under the jurisdiction of that State and should not come within the scope of a convention on consular relations. The proposed amendment would not weaken the text of sub-paragraph (*a*) but would overcome the formal difficulties which arose from the International Law Commission text.

33. The drafting committee might perhaps consider whether the English phrase " have access to " and the Spanish translation were exactly equivalent.

34. Mr. WOODBERRY (Australia) said that the principle set out in paragraph 1, sub-paragraph (*a*), of article 36 — the right of communication and access of consuls to their nationals and *vice versa* — was a very important consular function, and particularly so in countries where there were a large number of foreign nationals. His delegation believed, however, that the fundamental right must be qualified with regard to the wishes of the individual. In its view, particular care must be taken in expressing the principle, and the International Law Commission draft left something to be desired. In particular, the phrase " in appropriate cases " in paragraph 1, sub-paragraph (*a*), was unduly vague and his delegation therefore proposed an oral amendment, to delete those words and replace them by the words " subject to the wishes of the person concerned ". That amendment, in effect, extended to sub-paragraph (*a*) the essence of the amendment to sub-paragraphs (*b*) and (*c*) proposed by the delegation of Switzerland (L.78), which the Australian delegation would support. There was no need to stress the extreme importance of not disregarding, in the present or any other international document, the rights of the individual. Those rights were all-important, and were embodied in the principle upon which the United Nations was based. It seemed to his delegation that it would be a serious departure

APR-10-98 09:54 FROM:LEGAL ID:7367559 PAGE 3/14



from those principles to deny to the individual his right to say whether or not he wished to be approached by consular officials. In that, as in other respects, as provided by the Swiss amendment, he must be treated as a free agent. That was a fundamental matter.

35. Mr. PEREZ HERNANDEZ (Spain) supported the representative of Ecuador's drafting amendment and suggested that it should be referred to the drafting committee.

36. He did not fully agree with the arguments on which the Venezuelan amendment was based. The right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country, established by the International Law Commission's draft, was one of the most sacred rights of foreign residents in a country. The fact that it was established under national law in no way conflicted with the need to establish it under international law.

37. Mr. SAYED MOHAMMED HOSNI (Kuwait) remarked that in essence his argument had already been stated by the representative of Spain. He supported the Venezuelan amendment because the International Law Commission's text introduced a novelty to the convention by defining the rights of the nationals of the sending States and not, as stated in paragraph 1 of the commentary, the rights of consular officials. The International Law Commission's draft was, in fact, defining rights which were not established under international law, and it might follow that those rights would have to be established. In his view, the Venezuelan amendment was more in keeping with the intentions of the International Law Commission. As representative of a country with many aliens on its territory, he fully believed in the rights of nationals of sending States and was against restricting them; but they were irrelevant to the convention under discussion.

38. Mr. PEREZ-CHIRIBOGA (Venezuela) assured the representative of Spain that his amendment was not intended as an encroachment on the right of nationals of the sending State to communicate with their consulates. His objection to the International Law Commission's draft was that an article in a convention on consular relations should not start by referring to the nationals of the sending State. He was ready to accept any modification to this amendment that would make its purpose clear.

39. Mr. DAS GUPTA (India) noted that his amendment was in part similar to that submitted by Australia. He proposed the deletion of the words " in appropriate cases " because they would restrict the functions of the consular service and it would be necessary to decide what were appropriate circumstances. In order to carry out its responsibilities for the welfare of the nationals of the sending State, the consulate must have the right of access and communication. Similarly, residents abroad should have free access to their national consulates. The three words in question would curtail, if not remove, a government's inherent right to maintain contact with its nationals, and it would become questionable whether there was any need for consulates. He could not accept the additional words proposed by the Australian representative.

40. Mr. HEUMAN (France) said the Venezuelan representative had raised a very interesting point of international law. At first sight it seemed that the principle of freedom of communication between consuls and nations abroad arose out of conventions on establishment of residence, but a closer look would show that it was based on an overlap between conventions on establishment and on consular conventions. The representative of Spain, whose views he supported, would confirm that the Franco-Spanish Treaty, which had existed for over 100 years, was made up of a mixture of consular and establishment clauses. The Venezuelan amendment had a strictly legal basis and had there been a universal convention on the establishment of residence he would have supported the amendment as falling in the province of that convention. As it was, however, the right of communication was guaranteed only by bilateral conventions and the draft convention on consular relations would have to fulfil not only its own functions but those of an international convention on establishment. He therefore supported the International Law Commission's draft, even though it was theoretical rather than practical.

41. With regard to the Australian amendment, which subordinated the right of access to a national abroad to his willingness or otherwise to accept it, he appreciated its respect for the rights of the individual but questioned its applicability to a free person. Any free national had the right not to accept a visit from a consul if he did not wish to; there was no need to make it a subject of an article in a convention. It might be possible to introduce the amendment under sub-paragraph (*b*) or (*c*) dealing with arrested persons, but he would prefer to abstain from voting on it.

42. Baron van BOETZELAER (Netherlands) favoured the Australian amendment but, like the representative of France, doubted the need for it. If it were included at all, it would be better in negative form. The Australian representative might consider re-drafting it on the following lines: " unless the person concerned objects to it ".

43. Mr. JESTAEDT (Federal Republic of Germany) said that the International Law Commission's draft presented no difficulty. Article 27, paragraph 1, of the Vienna Convention on Diplomatic Relations provided that the receiving State " shall permit and protect free communication on the part of the mission for all official purposes "; and a similar provision had been approved in article 35 of the draft convention under consideration. In the International Law Commission's draft, free communication was interpreted as including free access for nationals of a sending State to its diplomatic missions, but no provision for free access to diplomatic missions had been included in the Vienna Convention. The principle was, however, particularly important to consular functions, and he welcomed its inclusion in the present draft.

44. The Australian amendment was important and he agreed with the representative of France that it might be dealt with under sub-paragraphs (*b*) or (*c*). He was unable to vote in favour of any reference to the wishes of the person concerned since it was a matter that could cause diplomatic friction between the receiving and the sending State.

45. Mr. MARAMBIO (Chile) said that, since the subject of chapter II, section I, was the facilities, privileges and immunities relating to a consulate, it would be better and more logical to begin the paragraph in the way proposed in the Venezuelan amendment, which might be supplemented. The Indian amendment was constructive and would render the paragraph less restrictive. The same train of reasoning led him to oppose the Australian amendment.

46. Mr. SHITTA-BEY (Nigeria) found the Australian amendment unacceptable, for the reasons advanced by the representatives of the Federal Republic of Germany and of Chile. He supported the Venezuelan amendment (L.100) because the convention was concerned primarily with consular functions. The nationals of sending States would be adequately protected by article 36 without the emphasis being placed on them in paragraph 1 (*a*). He suggested, however, that the Venezuelan amendment would be improved by the deletion of the words " if necessary ". He agreed with the reasoning of the representative of India, but thought his amendment unnecessary.

47. Mr ALVARADO GARAICOA (Ecuador) said that the freedom of nationals to communicate with and have access to their consulates came within the scope of the Declaration of Human Rights rather than of a convention on consular relations. He suggested the deletion of the words " The competent consulate and " and " if necessary " from the Venezuelan amendment.

48. Mr. BOUZIRI (Tunisia) said that he would abstain from voting on the Indian amendment because he was not convinced that the words which it was proposed to delete would in fact limit the freedom of consulates to communicate with their nationals. He understood paragraph 1 (*a*) to mean that the consular officials should be free to communicate with their nationals and to visit them when necessary. It was, he believed, linked with freedom of movement under article 34. He would vote against the Venezuelan amendment because it seemed ambiguous and he did not fully understand its purpose. He would also vote against the Australian amendment, though reluctantly, because he believed that it was well intentioned. A consul was free to visit his nationals just as the nationals were free not to receive him; a provision of the kind proposed would only be necessary in the case of a person detained or in prison.

49. Mr. SALLEH bin ABAS (Federation of Malaya) said that he did not support the Venezuelan amendment, since he did not agree that there was a conflict between the recognition of rights for the nationals of sending States under international law and the practice of establishing those rights under national law. Further, the words " if necessary " would give rise to the difficulty of deciding in what circumstances consular officials should have access to their nationals. The Australian amendment had been submitted for humanitarian reasons; nevertheless he agreed with the representative of the Federal Republic of Germany that it might prove controversial. He might be able to support it if its sponsor could produce satisfactory explanations. The Indian amendment was the best; it would widen the range of a consular official's freedom of access to the sending State's nationals to include nationals in detention or in prison.

50. Mr. DAS GUPTA (India) maintained his amendment. The International Law Commission's draft, with the words " in appropriate cases " deleted, would ensure unrestricted two-way communication between consulates and their nationals. He could not accept the Venezuelan amendment, even with the change suggested by the Nigerian representative, for it only ensured communication and access by the consulate. Moreover, he did not agree that the International Law Commission's draft established a new right, for the right given to consulates implied a corresponding right for nationals.

51. Mr. PEREZ-CHIRIBOGA (Venezuela), commenting on the Malayan representative's remarks, insisted that he did not wish to limit the normal relations that existed between the consular officials and the nationals of sending States, or to deny that international agreement could be reached on the rights and duties of nationals. He merely wished to make it clear that the draft convention was not the appropriate instrument. He agreed to the sub-amendments to his proposal suggested by the representatives of Ecuador and Nigeria.

52. Mr. MARESCA (Italy) supported the Venezuelan amendment in its new form, since it correctly emphasized the consulate, which was the main subject of article 36. To enable consuls to meet their nationals, however, was only one side of the question, and he hoped that the representative of Venezuela would agree to provide in his amendment for nationals to meet their consuls. He supported the Indian amendment, for it was essential not to restrict communication between consuls and their nationals. He could not support the Australian amendment, although he appreciated the motives behind it, for it would restrict normal consular activities.

53. Mr. PEREZ HERNANDEZ (Spain) said that, as a former head of the Spanish diplomatic mission in Caracas, he was fully aware of Venezuela's respect for the interests and rights of foreigners. In spite of national legislation, however, circumstances sometimes arose where foreign nationals — possibly through differences of language or customs — might have a peculiar status and might need consular protection. But consular protection could only be provided if it were asked for, and two-way communication between consulates and their nationals was therefore essential. To meet the differences of opinion that had emerged during the discussion, he suggested that paragraph 1 (*a*) should be drafted on the following lines: " Nationals of the sending State as such, and in order, if necessary, to ensure protection and assistance by consular officials, shall be free to communicate . . ."

54. Mr. ALVARADO GARAICOA (Ecuador) proposed the addition to the Venezuelan amendment of the words " nationals of the sending State shall have the same rights ".

The meeting rose at 5.45 p.m.

## SIXTEENTH MEETING

*Friday, 15 March 1963, at 10.45 a.m.*

*Chairman:* Mr. GIBSON BARBOZA (Brazil)

**Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6) (*continued*)**

*Article 36* (Communication and contact with nationals of the sending State) (*continued*)

*Paragraph 1 (a)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 36, paragraph 1 (*a*), and amendments relating to it.[1]

2. Mr. PEREZ-CHIRIBOGA (Venezuela), announcing the withdrawal of his delegation's amendment (L.100), said that Venezuela would instead submit, jointly with Ecuador, Spain, Chile and Italy, an alternative text for paragraph 1 (*a*) in the following terms:

" Consular officials shall be free to communicate with the nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officials of the sending State."

3. Mr. AJA ESPIL (Argentina) referred to the two important oral amendments proposed at the previous meeting, one by India (omission of the words " in appropriate cases ") and the other by Australia to delete those words and to insert the words " subject to the wishes of the person concerned ". He agreed to the first of those proposals, inasmuch as paragraph 1 (*a*) laid down a general principle which should not be weakened. The Australian amendment likewise appeared appropriate. The object was to lay down a right exercisable by a consular official vis-à-vis the receiving State, but not vis-à-vis a national of the sending State; the consent of the national in question was required.

4. Mr. LEVI (Yugoslavia) proposed two sub-amendments to the joint oral amendment just submitted: in the first sentence the words " in the exercise of their functions " should be added, and in the second sentence the words " for the same purposes " should be added.

5. Mr. EVANS (United Kingdom) said that article 36 was an important provision and should be drafted in unambiguous terms; it dealt with a matter which was all the more delicate in modern times when means of transport and travel were developing steadily. On the other hand, it should be noted that the scope of the article was limited by the opening words: " with a view to facilitating the exercise of consular functions ". His delegation supported the Indian amendment to omit the words " in appropriate cases ". If those words were left in the text it would remain an open question who would decide in what cases there should be freedom of communication. Some such phrase as " subject to the express wish of the person concerned " would be preferable to " in appropriate cases ". He realized the motives underlying the amendments before the Committee. In particular, he wished to mention that cases had occurred in which political refugees had been molested by consular officials of their State of origin. That was against proper exercise of consular functions and his government had made it clear that it would not permit it. However, his delegation and others would propose a separate article of more general scope to deal with the broader question of political refugees.[2] For that reason and because the Australian delegation's amendment, though attractive, introduced an element of uncertainty into article 36 and was open to certain technical objections, he thought it would be better simply to omit the words " in appropriate cases " without substituting the phrase proposed by Australia. He would prefer the article as drafted by the International Law Commission (without the words " in appropriate cases ") to the joint amendment just submitted.

6. Mr. TILAKARATNA (Ceylon) supported the Australian delegation's amendment. He also supported the Swiss delegation's proposal (L.78) that another paragraph should be added. He agreed with the Italian delegation that the article should stress consular functions and that the drafting committee should be instructed accordingly.

7. Mr. SHITTA-BEY (Nigeria) said that the Indian delegation's amendment was acceptable to him. With reference to the Australian delegation's amendment and the United Kingdom's suggestion, he thought it would not be excessive to qualify the clause by some such phrase as " subject to the wishes of the person concerned ". He thought there was little difference in substance between the new joint amendment and the original draft as amended by India.

8. Mr. ADDAI (Ghana) associated himself with the remarks of the United Kingdom representative.

9. Mr. WOODBERRY (Australia) said that article 36 suffered from the defect that it empowered the consul to get into touch with the nationals of the sending State regardless of their wishes. He opposed the Indian amendment, which would in effect strengthen the language of the existing text.

10. Mr. SRESHTHAPUTRA (Thailand) said that his delegation attached great importance to article 36. With regard to sub-paragraph (*a*) of paragraph 1, he shared

[1] At the fifteenth meeting, an amendment had been submitted by Venezuela (A/CONF.25/C.2/L.100) and oral amendments by Australia and India. For the full list of amendments to article 36, see the summary record of the fifteenth meeting, footnote to para. 28.

[2] See document A/CONF.25/C.1/L.124.

BEST AVA

APR-10-98 09:56 FROM:LEGAL ID:7367555 PAGE 6/14



the opinion of the Australian representative that the wishes of the persons concerned should be considered.

11. Mr. SERRA (Switzerland) said that, after listening to the debate on paragraph 1 (*a*) of article 36, he noted that many amendments reflected an identical concern. The freedom of the human person and the expression of the will of the individual were the fundamental principles which governed instruments concluded under the auspices of the United Nations. The text being drafted by the Conference should likewise reflect those principles. The Swiss delegation was prepared to agree to any proposal which referred to the freely expressed wish of the person concerned. That was the object of its amendment for the addition of a new paragraph, but it would not oppose the suggestion that the same idea should be reflected in a passage appearing at the beginning of paragraph 1, or in each of its sub-paragraphs, or at the end of paragraph 2. What mattered was that the essential principle which he had mentioned and which was laid down in a number of bilateral conventions should be stated in the text being prepared by the Conference. He would be unable to accept any formula which ignored the will of the persons concerned.

12. Mr. N'DIAYE (Mali), referring to article 36 as a whole, said that the protection of nationals of the sending State was the principal function of consulates, as was expressly provided in many bilateral consular conventions. The natural protector of a person abroad was undoubtedly his country's consul. In the case of an arrest, for example, the consul should be notified immediately so that he could take whatever action was needed under article 5 which had already been adopted by the First Committee.

13. He could not agree to the amendment submitted by Japan (L.56) or to that submitted by Switzerland (L.78), for under the first of those amendments there had to be an express request by the person in custody before the consul could be notified, while under the other the operation of sub-paragraphs (*b*) and (*c*) would be subject to the express wish of that person. Similarly, he would oppose the United States amendment (L.3), under which the consul would not be notified except in cases where the person detained suffered from some physical or mental incapacity. He would be unable to vote for the amendment submitted by Thailand (L.101) for if sub-paragraph (*b*) were omitted, article 36 would lose much of its substance. Nor could he agree to the amendment submitted by Spain (L.114). On the other hand he could accept the joint amendment which was more concise than the International Law Commission's draft.

14. His delegation might, however, be prepared to vote for the United Kingdom amendment (L.107) under which the authorities of the receiving State would be bound to notify the consul forthwith; the amendment of the Federal Republic of Germany (L.74) which stipulated a specific period beyond which a national of the sending State could not be held *incommunicado*, which would normally be the period necessary for the preliminary investigation; and the Belgian amendment (L.25) under which the consul would be authorized not only to converse with the person in custody, but also to write to him.

15. Mr. PEREZ HERNANDEZ (Spain) said that the object of the joint amendment, of which his delegation was one of the sponsors, was to offer a compromise. It guaranteed freedom of communication between nationals of the sending State and its consular officials, in keeping with the principle laid down in article 36. Naturally if the person concerned declined to receive the consul's visit, he could hardly claim the benefit of protection by the sending State.

16. Mr. SPYRIDAKIS (Greece) said that the article under discussion was of particular interest to his country because many Greek nationals lived abroad. He preferred the joint amendment to the original draft and would vote for it. The principle on which the Swiss amendment was based was sound, but might not be easy to apply in practice.

17. Mr. BOUZIRI (Tunisia) pointed out that the Swiss delegation's amendment was not concerned with sub-paragraph 1 (*a*) of article 36.

18. The CHAIRMAN said that it was quite correct that the amendment in question did not affect sub-paragraph (*a*), but it laid down a general principle which had a bearing on the article as a whole. The substance of the amendment would, of course, be discussed in connexion with sub-paragraph (*b*).

19. Mr. DAS GUPTA (India) said that a person, even though abroad, still remained subject to the jurisdiction of his country of origin; accordingly that country's consul should be empowered to communicate with him in any case. What was really at stake was an undeniable right vesting in the sending State. So far as substance was concerned, the joint amendment was consistent with the International Law Commission's draft, but he did not think that the amendment was drafted in formal legal terms.

20. Mr. PEREZ-CHIRIBOGA (Venezuela) said that the joint amendment, if adopted, would no doubt be referred to the drafting committee for final drafting. He thought it logical that in chapter II, entitled " Facilities, privileges and immunities of career consular officials and consular employees ", a provision concerning consular officials should precede a clause relating to nationals of the sending State.

21. The CHAIRMAN put to the vote the Australian delegation's amendment replacing the words " in appropriate cases " in paragraph 1 (*a*) by the words " subject to the wishes of the person concerned ".

*At the request of the representative of Thailand, a vote was taken by roll-call.*

*Peru, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Thailand, Argentina, Australia, Canada.

*Against:* Philippines, Poland, Portugal, Romania, San Marino, Saudi Arabia, Sierra Leone, South Africa, Sweden, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Ceylon, Congo

LABLE COPY

(Leopoldville), Cuba, Czechoslovakia, Denmark, Finland, Federal Republic of Germany, Ghana, Greece, Hungary, India, Indonesia, Kuwait, Laos, Liberia, Libya, Luxembourg, Mali, Mexico, Mongolia, Morocco, Norway, Pakistan.

*Abstaining:* Spain, Switzerland, Syria, United States of America, Venezuela, Republic of Viet-Nam, Yugoslavia, Austria, Chile, China, Colombia, Ecuador, Federation of Malaya, France, Holy See, Iran, Ireland, Israel, Italy, Japan, Republic of Korea, Liechtenstein, Netherlands, New Zealand, Nigeria.

*The Australian delegation's oral amendment was rejected by 44 votes to 5, with 25 abstentions.*

22. The CHAIRMAN put to the vote the joint oral amendment submitted by Chile, Ecuador, Italy, Spain and Venezuela.

*At the request of the representative of Thailand, a vote was taken by roll-call.*

*Brazil, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Columbia, Czechoslovakia, Ecuador, France, Federal Republic of Germany, Greece, Guinea, Holy See, Hungary, Ireland, Italy, Japan, Republic of Korea, Kuwait, Laos, Liberia, Libya, Luxembourg, Mali, Mexico, Mongolia, Morocco, Pakistan, Poland, Portugal, Romania, San Marino, Sierra Leone, South Africa, Spain, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Republic of Viet-Nam, Yugoslavia, Argentina, Australia, Belgium.

*Against:* Ceylon, Ghana, India.

*Abstaining:* Cambodia, Congo (Leopoldville), Cuba, Denmark, Federation of Malaya, Finland, Indonesia, Iran, Israel, Liechtenstein, Netherlands, New Zealand, Nigeria, Norway, Philippines, Saudi Arabia, Sweden, Switzerland, Syria, Thailand, United Arab Republic, Austria.

*The joint amendment was adopted by 48 votes to 3, with 22 abstentions.*

23. Mr. JESTAEDT (Federal Republic of Germany) said that paragraph 1 (*a*) of article 36 did not debar consulates from having access to persons who were not nationals of the sending State and who wished to talk to consular officials.

24. Mr. BLANKINSHIP (United States of America) said that his delegation's abstention on the Australian amendment should not be construed as meaning that the United States in any way admitted that consular officials had the right to exert any pressure on their compatriots who were political refugees.

25. Mr. SHARP (New Zealand) said that, despite the close bonds and numerous interests in common between Australia and New Zealand, he had had to abstain on the Australian amendment. New Zealand, like Australia, was a country of immigration which had admitted a large number of political refugees. It would be most undesirable if consular officials of the countries of origin of such persons should enter into contact with them despite objections on their part. The United Kingdom proposal for adding a new article concerning political refugees would partly dispel the New Zealand delegation's concern in that respect. The convention did not, of course, diminish in any way the rights of the nationals of the sending State, and New Zealand would not interpret paragraph 1 (*a*) of article 36 as empowering consular officials to persist in a course of conduct which was repugnant to the wishes and freedoms of the individuals concerned.

26. Mr. BOUZIRI (Tunisia) thanked the delegation of Venezuela for having agreed to sponsor a compromise text in lieu of its own earlier amendment. The joint compromise text hardly differed from the text as originally drafted by the International Law Commission, and accordingly Tunisia had been able to vote in its favour.

27. Mr. DAS GUPTA (India) said that the joint amendment in substance resembled the original draft but, for stylistic reasons and because it was drafted in more precise legal language, he would have preferred the original text. Accordingly, he had voted against the joint amendment.

28. Mr. DE CASTRO (Philippines), explaining his abstention, said that the original draft of the International Law Commission was fully satisfactory to his delegation.

29. Mr. WALDRON (Ireland) explained that he had been unable to vote for the Australian amendment because it qualified the right of consular officials to communicate with their fellow-nationals.

30. Mr. WOODBERRY (Australia) stated for the record that his government would interpret the expression " freedom " in the sense of " optional ".

31. Mr. RODRIGUEZ (Cuba) said that he had felt obliged to abstain on the joint amendment because it introduced no innovations.

32. Mr. ADDAI (Ghana) said he had voted against the joint amendment because the original was preferable from the drafting point of view.

*Paragraph 1 (b)*

33. The CHAIRMAN invited debate on article 36, paragraph 1 (*b*), and drew attention to the amendments thereto.[8]

34. Mr. SRESHTHAPUTRA (Thailand) said that the reasons for proposing the deletion of paragraph 1, sub-paragraph (*b*), had been stated in his government's comments on the draft. There were over four million aliens in Thailand, and they were free to live in any part of the territory — an area of 500,000 square kilometres — except for the areas which were prohibited

[8] Amendments to paragraph 1 (*b*) had been submitted by the United States of America, Japan, the Federal Republic of Germany, Thailand, the United Kingdom and Greece.

APR-10-98 09:57 FROM:LEGAL TO:7367555 PAGE 8/14



on security grounds; some of them resided in very remote districts. Sub-paragraph (*b*) imposed an obligation which his government would be unable to fulfil, and he would therefore oppose it.

35. Mr. KANEMATSU (Japan) said that the interests of the sending State were not so great that it was necessary to provide for the receiving State's obligation to inform the consulate of the detention of a national of the sending State. That obligation was owed only if the person concerned wished the consulate to be informed. The provision proposed by Japan (L.56) was very close to that proposed by Switzerland (L.78)[4] and accordingly the Japanese delegation would, if the Swiss amendment was adopted, withdraw its amendment.

36. Mr. LEE (Canada) said that he likewise regarded the obligation stipulated in paragraph 1 (*b*) as excessive; besides, what would be the position if a person had double nationality? Other possible cases which illustrated his point were, for example, those where a person was arrested for a minor offence during a short stay in a neighbouring country; so strict a rule as that laid down in paragraph 1 (*b*) should surely not be applicable in such cases. He would accept the proposals of the United States (L.3), the United Kingdom (L.107) and Greece (L.125).

37. Mr. KAMEL (United Arab Republic) proposed the deletion of the first sentence of paragraph 1 (*b*) and the amendment of the second sentence by the deletion of the word " undue ", as proposed by the United Kingdom.

38. Mr. JESTAEDT (Federal Republic of Germany) referring to his delegation's amendment (L.74), under which the receiving State would have one month's time limit by which to inform the consulate of the sending State of the arrest or detention of a national of that State, said that he would be prepared to accept a shorter time limit.

39. Mr. BLANKINSHIP (United States of America) said that under his delegation's amendment (L.3) the receiving State would not be bound to notify the consulate of the sending State of the arrest of one of the nationals of that State who did not wish to have his name notified to the authorities of the sending State. The object of the amendment was to protect the rights of the national concerned. His delegation's purpose should not be misconstrued. As the Canadian representative had said, a person spending a short period in a neigbouring State might commit a trivial offence of which, for very understandable reasons, he might not like his consulate to be informed. To avoid such situations the United States proposed that the words " at the request of a national of the sending State " should be added. In addition, in referring to the cases of persons suffering from some physical or mental incapacity, the amendment filled a gap in the original draft.

40. While recognizing the force of the argument of the representative of Thailand, he said that no country could disregard its obligation in certain circumstances to inform the sending State's consulate of the arrest of one of the nationals of that State. The United Kingdom amendment (L.107) was acceptable to the United States.

The meeting rose at 1.10 p.m.

[4] The Swiss amendment proposed the insertion of a new paragraph 2.

## SEVENTEENTH MEETING

*Friday, 15 March 1963, at 3.15 p.m.*

*Chairman:* Mr. GIBSON BARBOZA (Brazil)

**Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6) (*continued*)**

*Article 36* (Communication and contact with nationals of the sending State) (*continued*)

*Paragraph 1 (b)*

1. The CHAIRMAN invited the Committee to continue consideration of paragraph 1 (*b*) of article 36 and the relevant amendments.[1]

2. Mr. HEUMAN (France) said that article 36 was one of the most important in the whole draft. For theoretical purposes, the International Law Commission's formulation of the principle stated in paragraph 1 (*b*) could not be improved on. The absolute and unconditional obligation of the authorities of the receiving State to notify the sending State's consul if a national of that State was committed to prison or detained in custody was included whenever possible in bilateral conventions signed by France, and he had been glad to see it included in the draft convention.

3. It must be recognized, however, that principles were often very different from practical possibilities. Many countries, such as Thailand and Canada, had a large number of permanent foreign residents; others, such as his own, had a large seasonal influx of foreign tourists and week-end visitors. In both cases paragraph 1 (*b*) would impose an impossible task on the authorities of the sending State, and it would not be wise or reasonable, or even honest, to approve an article which could not be complied with. A less ambitious solution must be found, even if it were an inferior one, to meet the facts of the situation.

4. He was therefore forced to compromise by accepting the idea, supported by many representatives at the previous meeting, that consuls should be notified only when the person concerned so requested. Of the various amendments before the Committee, that submitted by the United States of America (L.3) offered the best solution. It was based on the idea that the person detained should take the initiative, unless he was prevented from doing so by mental or physical incapacity, in which

[1] For the full list of amendments to article 36, see the summary record of the fifteenth meeting, footnote to para. 28; for the amendments to paragraph 1 (*b*), see the summary record of the sixteenth meeting, footnote to para. 34. An oral amendment to paragraph 1 (*b*) had also been proposed by the United Arab Republic.

APR-10-98 09:58 FROM:LEGAL ID:7367559 PAGE 9/14



case the authorities of the receiving State must notify the competent consulate.

5. He regretted that Canada had withdrawn an excellent earlier proposal to the effect that the authorities of the receiving State should be obliged to notify the consuls if one of his country's nationals were arrested. In the circumstances, he would vote for the United States amendment, though he wished to point out two shortcomings. First, the International Law Commission's draft and all the amendments, including that of the United States, referred to detention or committal to prison or to custody pending trial, but none of them mentioned arrest. He might at a later stage propose the addition of the word " arrested " to the United States amendment. Secondly, many of his own country's bilateral agreements, especially those with African countries, contained a clause on the lines of the United States amendment, but with an additional provision giving the consul the right to receive periodically a list of nationals of the sending State in prison or custody or under detention. He might at a later stage propose as a sub-amendment to the United States amendment an additional sentence on the following lines:

" The competent authorities shall further be required, on request by the competent consulate of the sending State, to communicate to it periodically a list of the nationals of that State who are detained, except for those who object to such information concerning them being communicated to the consulate." [2]

6. To sum up, he fully supported the United States amendment, but reserved the right to propose two sub-amendments.

7. Mr. MARESCA (Italy) said that freedom was an essential part of human dignity. If consuls were not informed of restrictions on the personal freedom of nationals abroad they would be unable to carry out their task of protecting the interests of those nationals and looking after their welfare. It was therefore the responsibility of the receiving State's local authorities to inform the consul of the imprisonment, detention or holding in custody of any national of the sending State. He was therefore strongly opposed to the deletion of paragraph 1 (*b*). He could accept the idea of notification being dependent on the wish of the person concerned, provided that it would always take place if that person did not object. He supported the Greek amendment (L.125), which was constructive and improved the International Law Commission's text; but he could not support the amendment by the Federal Republic of Germany (L.74), because it would invite delay in notification.

8. The CHAIRMAN invited Mr. Žourek to explain why the International Law Commission had included the words " without undue delay " in its draft, as they had given rise to considerable comment at the previous meeting.

9. Mr. ŽOUREK (Expert) said that the words had not appeared in the original draft but had been added after long discussions both in plenary meetings and in the drafting committee.[3] They were intended to allow for cases in which the receiving State's police might wish to hold a criminal in custody for a time. For example, if a smuggler was suspected of controlling a network, the police might wish to keep his arrest secret until they had been able to find his contacts. Similar measures might be adopted in case of espionage. The International Law Commission had felt that if the provision was to be capable of application and to be applied, such cases would have to be taken into account because they arose in practice.

10. Mr. LEVI (Yugoslavia) said that he could not support the representative of Thailand's proposal (L.101) to delete paragraph 1 (*b*), because that paragraph recognized an obligation that was already fulfilled in many countries. After hearing the explanation given by Mr. Žourek, he was not greatly in favour of the United Kingdom amendment (L.107). He could not accept the United States amendment (L.3), because it weakened the receiving State's obligation. The examples of detention overnight for drunkenness suggested by the representatives of Canada and the United States were not really valid, for the clause under discussion was applicable to much more important cases. He saw no objection in principle to the amendment by the Federal Republic of Germany (L.74), but thought it would be unsatisfactory in practice. A provision that the consul of the sending State should be informed at the latest within one month would not be practicable in Yugoslavia. The Greek proposal (L.125) was a wise one, but would be difficult to implement. In practice, it was not always easy to state the reasons for detention immediately. The amendment would be acceptable only if the reasons could be given in general terms; for example, by citing the article of the criminal code under which a person had been detained. He opposed the Japanese amendment (L.56) for the same reasons as he opposed the United States amendment.

11. Mr. CHIN (Republic of Korea) said that the receiving State's obligation under paragraph 1 (*b*) was extremely important, because it related to one of the fundamental and indispensable rights of the individual. Korea was a country in which there were many aliens and his government recognized the need for that obligation to be faithfully fulfilled in order to protect their interests. He therefore opposed the amendment submitted by Thailand. He was against any limitation of the obligation, but agreed with the United States, Canadian and other representatives that the burden on the receiving State could be reduced. He supported the United States amendment, but would prefer to see the words " without undue delay " replaced by the stipulation of a specific period, as proposed in the amendment by the Federal Republic of Germany, which conformed with practice in his country. His views on the other amendments were implicit in the comments he had just [illegible]

[2] See document A/CONF.25/C.2/L.131, in which, however, France proposed that the words in question should form a new sub-paragraph between paragraphs 1 (*b*) and 1 (*c*). This proposal was discussed at the eighteenth meeting (paras. 17-45).

[3] See *Yearbook of the International Law Commission*, 1961, vol. I (United Nations publication, Sales No. 60.V.I), summary records of the 534th to 537th meetings).

APR-10-98 09:59 FROM:LEGAL ID:7367555 PAGE 10/14



12. Mr. KRISHNA RAO (India) said that paragraph 1 (*b*) contributed to the progressive development of international law. He had serious doubts about the United States and Japanese amendments, which made the receiving State's obligation dependent on the wish of the person concerned, for if that person was in prison there was no way of knowing whether he had asked for his consul to be informed or not. Such a provision could only lead to difficulties, for disputes would arise between the receiving and the sending States as to whether the prisoner had or had not made a request. Paragraph 1 (*b*) merely required the competent authorities to inform the competent consulate; if the person concerned did not wish to see his consul he need not do so, for the other paragraphs of the article gave him the right to refuse. The reasoning of the United States and Japanese representatives was understandable, but their views were adequately covered by the Swiss amendment (L.78). He could not support the amendment by the Federal Republic of Germany, because authorities would naturally tend to postpone notification until the end of the time limit. He would vote against the Greek amendment because its adoption would oblige some countries represented at the Conference to make radical changes in their consular regulations and criminal codes, but he supported the United Kingdom amendment (L.107).

13. Mr. SPYRIDAKIS (Greece) said that his country had a large number of nationals in different parts of the world and was anxious to safeguard their rights. The Conference, in its task of codifying international law and customs on consular relations, was also following the present-day trend of promoting and protecting human rights, for which future generations would be grateful. Greece therefore attached very great importance to article 36, and was proposing to add one more to the safeguards it embodied.

14. The Greek amendment (L.125) was based on the experience of Greek nationals abroad, who had sometimes been arrested and confined for long periods without being allowed to contact their consulates. The International Law Commission's draft, with the addition proposed by Greece, would constitute an advance in protecting aliens, particularly nationals of small countries.

15. With regard to the other amendments, he could not support the United States amendment, which weakened the safeguards in paragraph 1 (*b*); he could support the amendment by the Federal Republic of Germany if the time limit were reduced to, say, ten days; and he could accept the United Kingdom amendment if it did not weaken the guarantees in paragraph 1 (*b*), though, bearing in mind Mr. Žourek's explanation, the International Law Commission's wording might be better.

16. Mr. TÔN THÂT ÂN (Republic of Viet-Nam) said that paragraph 1 (*b*) placed too great an obligation on the receiving State. The representative of Thailand had shown, at the previous meeting, what a heavy burden it would represent for his own country. In drafting universal provisions, it was important not to overlook legitimate exceptions and he therefore supported the amendment submitted by Thailand; if it were not adopted he would support the Japanese amendment, which lessened the receiving State's obligation.

17. Mr. BOUZIRI (Tunisia) said that he regarded paragraph 1 (*b*) as one of the most important in the draft. It was related to article 5 (Consular functions), approved by the First Committee, and as the representative of Italy had pointed out, one of the essential functions of a consul was to help and protect the nationals of the sending State. Detention (and he agreed with the French representative that arrest should also be included) was a serious infringement of the freedom and dignity of the individual. It was therefore unthinkable that the consul of the sending State should not be notified, and the obligation of the receiving State to notify him should be firmly established, for it was possible that in certain circumstances the foreign national might be unable to inform the consul and ask him for help and protection.

18. Objections had been raised at the previous meeting, and examples had been given of the difficulties which might arise in countries visited by thousands of foreign tourists. He did not deny the circumstances, but was sure that the proportion of arrests or detentions among tourists would be too small to justify the argument. The measures provided for in paragraph 1 (*b*) were necessary to protect the rights of foreigners, though, bearing in mind the difficulties mentioned by the French representative, notification need not be made immediate. The United States representative's apt reference to the possibility of a person refusing to see his consul was an exceptional case and did not affect the principle that an alien needed protection and his consul must give it. The United States representative wished notification to be made only on the request of the person detained; he himself would prefer the obligation to stand unless that person expressly objected. The same objection applied to the Swiss and Japanese amendments. The amendment submitted by Thailand conformed neither to international law nor to the facts. He would vote against the United States amendment unless it could be altered as he had suggested and could include a reference to arrest. He agreed with the idea contained in the amendment by the Federal Republic of Germany, but could only support that amendment if the time limit were reduced. He would vote in favour of the United Kingdom amendment.

19. Mr. EVANS (United Kingdom) fully agreed with the Tunisian representative's remarks. The rights of communication and contact with the nationals of sending States defined in article 36 were especially important for the persons under detention referred to in sub-paragraph (*b*). Such persons were obviously in very special need of consular help and the notification stipulated in sub-paragraph (*b*) was in many cases a necessary condition for providing it. It was essential to retain sub-paragraph (*b*) and he would therefore be obliged to vote against the amendment submitted by Thailand.

20. There should be a clear obligation to inform the competent consul in any case in which a national of the sending State was detained in the receiving State, and

APR-16-98 10:00 FROM:LEGAL ID:7367555 PAGE 11/19



to do so promptly. Only if the obligation were so framed could it really fulfil its purpose in all cases. That was why he had proposed that the word "undue" should be deleted; the wording of the draft implied that some delay was permissible. His government consistently used the words "without delay" and "promptly" in bilateral agreements and he was aware of no resultant difficulties. The amendment by the Federal Republic of Germany would allow far too long a delay; if the Committee wished to allow some latitude the most he could accept would be about 48 hours.

21. He had serious misgivings about the amendment advocated by the United States and Japanese representatives. The experience of his own country showed that such a provision might give rise to misunderstanding and uncertainty in practice. An important consideration was the language difficulty for persons travelling abroad. That might well have been the cause of misunderstanding in a recent case in which a United Kingdom national had been detained; the authorities of the receiving State had maintained that he had made no request for the consul to be informed, but when released a few days later he had said that he had asked to be allowed to communicate with his consul several times. It was better to lay down a clear and straightforward obligation which left no room for misunderstanding and he would prefer the International Law Commission's text as it stood. He recognized the possibility of special problems, as in the case of neighbouring countries where people crossed the border frequently for work or pleasure; but he suggested that those problems could be solved by other means than weakening the obligation under sub-paragraph (*b*). States with such problems might, for example, make bilateral arrangements to waive or limit their respective rights under the article to suit their mutual convenience. Another solution would be to add a sentence to the effect that the obligation applied only where persons were detained for more than 48 hours. He supported the Greek amendment, which was an improvement on the original draft.

22. Mr. AMLIE (Norway) referred to the arguments advanced by the representatives of Canada and the United States at the previous meeting to justify their desire for caution. He realized that there were strong reasons for caution; but there were even stronger reasons for imposing an absolute obligation. He too could give examples. Norway possessed a large merchant navy and its seamen, especially on their first visit abroad, were often faced by dangers and temptations. That was why Norway maintained so many consulates abroad. His own experience in Brazil had shown that with police co-operation, and provided the consul was notified immediately, many seamen could be saved from trouble and the trouble-makers speedily removed. In countries where such immediate notification and co-operation were not the general practice seamen could be arrested; the receiving State's authorities could say that they did not want consular help, and the sending State could never prove the contrary. As the Indian representative had pointed out, such situations could cause endless strife and argument between the receiving State and the sending State.

23. As legislators (for the Conference was engaged in laying down international law), the drafters of the convention could not deal with minor cases; they must establish basic rules. The only basic rule to be adopted in the present case was the one drafted by the International Law Commission, without reference to the will or desire of the person detained.

24. Mr. SRESHTHAPUTRA (Thailand) stressed that his delegation had proposed the deletion of sub-paragraph (*b*) not because it was not in agreement with the principle of the sub-paragraph, but because, as he had explained at the previous meeting, his government could not accept any obligation which it knew it would be unable to fulfil for practical reasons. He did not understand how his statement of fact concerning the special position of his country could be interpreted as a defiance of international law, as certain representatives appeared to have suggested.

25. Mr. BOUZIRI (Tunisia) suggested that if a country was unable to accept a particular provision it was open to it to make a reservation regarding the article concerned, rather than propose the omission from the convention of a principle which could be applied by other countries.

26. Mr. DE CASTRO (Philippines) said that the amendment proposed by the Federal Republic of Germany and the United Kingdom approached the problem from the standpoint of the sending State, as did the International Law Commission's draft, whereas the amendments submitted by Japan, Thailand and the United States represented the approach of the receiving State. When an alien entered a country, he accepted its jurisdiction. In his delegation's view the alien should not be denied the same protection as the nationals of the receiving State, but should nevertheless not be granted a higher degree of protection. The Japanese and United States amendments, therefore, appeared to embody the principle which would be most generally acceptable, that the consulate should be notified by the authorities of the receiving State when they were so requested by the person concerned. The word "reason" in the Greek amendment seemed to imply that some explanation should be provided by the authorities of the receiving State in addition to a statement of the charge made, that might give rise to some difficulty. He would therefore suggest that the competent authorities should be required to state "the charge or cause of his being deprived of his liberty".

27. Mr. PEREZ HERNANDEZ (Spain) said that the right of the consulate to be informed so that it might protect the detained person was clearly stated in the International Law Commission's draft. His delegation favoured those amendments which were designed to improve, and not restrict, the draft, such as the proposal by the Federal Republic of Germany that the period within which the consulate must be notified should be specified. A time-limit of one month seemed too long, however, since during that period the situation of the detained person might worsen considerably. His delegation would prefer a shorter period, but

rather longer than the forty-eight hours suggested by the United Kingdom representative. His delegation would vote in favour of the Greek amendment; it was vital that the consulate should be informed of the reasons for which a person was being detained. Such a provision would also assist the local authorities in their task.

28. He could not support the Japanese and United States amendments, which were restrictive. Only after the consulate had been informed of his detention should the person concerned have the right to request, if he so wished, that the consulate should refrain from taking any action on his behalf. Adoption of the International Law Commission's draft would remove the necessity for the proposal in the third paragraph of the United States amendment, since the competent authorities would automatically inform the consulate of the detention of a physically or mentally handicapped person. The oral amendment proposed by France was a drafting point rather than a statement of a legal principle. His delegation would prefer a simple statement of the principle that the consulate must be informed when any of its nationals was " deprived of his liberty ".

29. He proposed that the meeting be suspended for a short time, so that delegations with similar views could try to reach agreement.

*The motion for the suspension of the meeting was carried by 29 votes to 8, with 17 abstentions.*

*The meeting was suspended at 5.10 p.m., and resumed at 5.50 p.m.*

30. Mr. BLANKINSHIP (United States of America) announced that after consultation during the suspension of the meeting, the delegations of Canada, Japan, Kuwait, Thailand, the United Arab Republic and the United States of America had agreed to submit a joint amendment to sub-paragraph (*b*), reading as follows:

" A consular official shall be informed without delay by the competent authorities of the receiving State if a national of the sending State who is arrested, committed to prison or detained in any other manner so requests. Any communications addressed to the consulate by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay."

31. The amendments previously submitted by the delegations of Japan (L.56), Thailand (L.101) and the United States of America (L.3), and the oral amendment proposed by the United Arab Republic had been withdrawn.

32. Mr. JESTAEDT (Federal Republic of Germany) said that in the light of the comments made on his delegation's amendment, he had decided to accept the United Kingdom suggestion that the consulate should be informed " at the latest within 48 hours ", and to revise the amendment further by proposing the deletion of the word " undue " before " delay " in the first sentence of sub-paragraph (*b*).

33. His delegation could not support the joint amendment just introduced because it did not differ in essence from the original United States amendment. The provision that the competent authorities should only inform the consulate at the request of the person detained might be the cause of grave friction between States.

34. His delegation would vote in favour of the Greek amendment.

35. Mr. NEJJARI (Morocco) said that if the consulate was to be given the onerous task of protecting its nationals it must be given the means to do so effectively, and must therefore be informed. His delegation could not accept the new joint amendment, but would support the International Law Commission draft. The time-limit within which the consulate must be informed should be short but reasonable — perhaps one or two weeks; forty-eight hours seemed too short.

36. Mr. HEUMAN (France) welcomed the inclusion in the joint amendment of his suggestion that reference should be made to arrest. If the joint amendment was rejected, he would ask for a separate vote on his proposal to insert the word " arrested " in the first sentence of the International Law Commission's draft, before the words " committed to prison ", and in the second sentence before the words " in prison ".

37. The discussion had centred on the question of whether a consulate should be informed automatically or only at the request of the person detained. It was true that in the case of minor offences, such as drunkenness or student brawls, there would be no desire to inform the consulate. Much more serious consideration must be given, however, to the interests of political refugees. It would be very undesirable if a receiving State was obliged, for example, to inform the consulate of a sending State immediately in a case where one of its nationals, wishing to break off relations with his country, had crossed the frontier clandestinely, since such a person could not be accorded refugee status overnight and would still come within the scope of the provision as drafted by the International Law Commission. The International Law Commission's draft of sub-paragraph (*b*) would be inapplicable under French law, and his delegation would support the joint amendment.

38. Mr. PEREZ HERNANDEZ (Spain) said that it was difficult to find the exact equivalent of " arrested " in Spanish and suggested that it might be preferable to refer simply to nationals being " deprived of liberty ".

39. The CHAIRMAN said that it was for the drafting committee, which had Spanish-speaking members, to ensure that the texts in all languages corresponded exactly.

40. Mr. SPYRIDAKIS (Greece) welcomed the revised amendment by the Federal Republic of Germany, which his delegation would support. He did not feel that there were sufficient grounds for the sub-amendment to his delegation's amendment suggested by the representative of the Philippines. " Reason " was a general term and might include a statement of the charge against the national concerned. The matter might perhaps be left to the drafting committee.

APR-16-98 10:01 FROM:LEGAL ID:7367555 PAGE 13/14



41. The CHAIRMAN invited the Committee to vote on the joint oral amendment presented by the delegations of Canada, Japan, Kuwait, Thailand the United Arab Republic and the United States of America.

42. Mr. KONSTANTINOV (Bulgaria), asked that the words "who ... so requests" in the first sentence of the joint amendment should be put to the vote separately.

43. Mr. HEUMAN (France) objected to the request for a separate vote, under rule 40 of the rules of procedure. The words on which a separate vote had been requested were the essential point of the amendment and their removal would leave a text which had little meaning.

44. Mr. SPACIL (Czechoslovakia) said that the text of the amendment would stand on its own after the removal of the words on which a separate vote had been requested. His delegation believed that the request for a separate vote was justified.

45. Mr. BLANKINSHIP (United States of America) opposed the motion for division. The proposed vote would set an unfortunate precedent. It would lead to further delay in the Committee's work if representatives were to single out a few words from any proposal for a separate vote. The purpose of the Bulgarian delegation could be attained simply by voting against the whole joint amendment which was in opposition to the International Law Commission's text.

46. Mr. BOUZIRI (Tunisia) supported the motion for division because under rule 40 of the rules of procedure the representative of Bulgaria had the right to request that a separate vote should be taken. The joint amendment did not differ from the original United States amendment. A separate vote was an accepted way of allowing delegations to show that they considered the inclusion of particular words to be undesirable. Accordingly, if the motion for division was carried, his delegation would take the opportunity to vote against the inclusion of the words "who ... so requests".

*The motion for division was rejected by 45 votes to 15, with 8 abstentions.*

47. The CHAIRMAN put to the vote the joint oral amendment as a whole.

*The amendment was rejected by 33 votes to 27, with 9 abstentions.*

*The amendment by the Federal Republic of Germany (A/CONF.25/C.2/L.74), as revised, was rejected by 33 votes to 11, with 24 abstentions.*

*The United Kingdom amendment (A/CONF.25/C.2/L.107) was adopted by 37 votes to 2, with 28 abstentions.*

*The Greek amendment (A/CONF.25/C.2/L.125) was adopted by 39 votes to 13, with 16 abstentions.*

48. The CHAIRMAN put to the vote the oral amendment submitted by the delegation of France, to insert the word "arrested", in sub-paragraph (*b*).

*The amendment was adopted by 42 votes to 5, with 21 abstentions.*

*Paragraph 1, sub-paragraph (b) as a whole, as amended, was adopted by 43 votes to 6, with 21 abstentions.*

49. Mr. HEUMAN (France) explained that he had abstained from voting on sub-paragraph (*b*) as a whole since it was contrary to French law to communicate to a third person — even a consul — the name of a detained person without the latter's consent.

50. Mr. SPACIL (Czechoslovakia) asked that it should be placed on record that, in accordance with the rules of procedure, any representative had the right to move that parts of a proposal or of an amendment should be voted on separately. The argument of the United States representative that the practice of voting separately on certain words should be avoided was in contravention to the rules of procedure and was against normal practice in the United Nations where separate votes were one of the means at the disposal of representatives for expressing their opinion on particular parts of proposals or amendments.

51. Mr. SRESHTHAPUTRA (Thailand) explained that he had voted against the International Law Commission's draft of sub-paragraph (*b*), not because his government was opposed to the principle but because it would find some difficulty in applying it.

The meeting rose at 6.55 p.m.

---

## EIGHTEENTH MEETING

*Monday, 18 March 1963, at 10.45 a.m.*

*Chairman:* Mr. GIBSON BARBOZA (Brazil)

---

**Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6) (*continued*)**

*Statement by the Chairman*

1. The CHAIRMAN said that, in order to speed up the Committee's work, he proposed to enforce stricter compliance with rule 30 of the rules of procedure, which provided that amendments should normally be introduced in writing and circulated to all delegations on the day preceding the meeting. In future, he would exercise less freely the discretion given to the Chair by that rule to permit the discussion of proposals that had only been circulated on the day of the meeting concerned. Furthermore, oral amendments would not be permitted unless they took the form of joint amendments accepted by the sponsors of one or more of the written amendments before the Committee; the introduction of oral amendments had been the principal source of delay to the Committee's proceedings, since they very frequently led to a reopening of the debate on the topic in question. Points of drafting for submission to the drafting committee would of course be accepted. No representative would speak more than once on the topic under discussion, but sponsors of written amendments would be permitted to speak before the vote in order to explain points that had arisen during the debate or to put forward a compromise solution. He hoped that the Committee would accept his proposals, which would be to the advantage of all delegations.

APR-10-96 10:02 FROM:LEGAL ID:7367555 PAGE 14/14



*Article 36* (Communication and contact with the nationals of the sending State) (*continued*)

*Paragraph 1 (b)*

2. Mr. KANEMATSU (Japan) explained that he had voted in favour of paragraph 1 (*b*) as adopted at the 17th meeting on the understanding that it applied to normal cases where the aliens under detention or arrest possessed passports, travel documents or other identity papers. But the large number of persons who attempted to enter Japan illegally and did not possess any papers constituted a great difficulty. In those cases the authorities could not ascertain the nationality of persons detained and arrested, and therefore could not comply with the provisions of paragraph 1 (*b*) by notifying the consular authorities immediately.

3. He understood that the United Kingdom would be proposing a new article on political refugees which might cover Japan's difficulty. Meanwhile, his delegation was asking its government for instructions on how to vote on the subject in the plenary meeting.

*Paragraph 1 (c)*

4. The CHAIRMAN invited the Committee to consider paragraph 1 (*c*) and the amendments submitted by Belgium (L.25), the Federal Republic of Germany (L.74) and Spain (L.114).

5. Mr. JESTAEDT (Federal Republic of Germany) introduced his amendment, which was intended to safeguard the interests of nationals of the sending State detained in mental institutions. For such cases, his government considered that a social worker would be more suitable than a consul.

6. Mr. PEREZ HERNANDEZ (Spain) supported the amendment.

7. Mr. RUSSELL (United Kingdom) said that he did not find the Federal German amendment fully acceptable. It was quite in order for a consul to be accompanied by any person when visiting a detained national; it was not in order for him to delegate to someone else the rights vested in him under article 36.

8. Mr. HARASZTI (Hungary) said that the extension of paragraph 1 (*c*) as proposed by the Federal Republic of Germany was not compatible with the draft convention. The facilities, privileges and immunities conferred by the Convention were for consular officials and could not be transferred to others — certainly not to nationals of the receiving State. The grounds stated by the representative of the Federal Republic of Germany were not convincing, for the additional phrase he proposed could also be interpreted as applying to lawyers acting for the consul. In Hungary only nationals of the receiving State could practise as lawyers and the rights and duties of lawyers were governed solely by Hungarian law. The amendment would therefore conflict with his country's laws concerning aliens, and he would vote against it.

9. Mr. SHITTA-BEY (Nigeria) said he understood the motive for the Spanish amendment (L.114) but the wording was ambiguous and might lead to complications. It was not at all clear, for example, to whom the national concerned could " expressly oppose " action on his behalf by consular officials. The amendment seemed to be reopening a question which had been very fully dealt with under other sub-paragraphs — namely, should the person concerned tell the receiving State's authorities that he did not want his consul to be called, or should he refuse to see the consul when he arrived ?

10. Mr. MARESCA (Italy) said that he saw some advantage in the amendment by the Federal Republic of Germany since the consul himself, with his many duties, would obviously be unable to see every national detained or imprisoned. He could accept the amendment if the other persons were clearly understood to be members of the staff of the consulate.

11. Mr. VRANKEN (Belgium) introduced his amendment (L.25) which stipulated that a consul should have the right to correspond with the national concerned. The consul might not always be able to visit nationals in prison or under detention, and there might also be circumstances where he would prefer to communicate by letter.

12. Mr. PEREZ HERNANDEZ (Spain) presented his delegation's amendment (L.114), which provided that consular protection should not be given against the wishes of a national. It was essential for the law to allow for the free will of the individual. In article 19 of the Argentine Constitution, respect for the free will of the individual was expressed in such fine literary Spanish that he would like to read it aloud. The individual had the right to protection but was not under an obligation to receive it. Protection was ensured by paragraph 1 (*a*), which prescribed freedom of communication between consul and national, and paragraph 1 (*b*), which prescribed that the consul should be informed of a national's detention or imprisonment; but neither took account of the individual's wishes. There might be cases of purely private concern where an individual would prefer legal proceedings to the intervention of the consul, and the Spanish amendment was designed to safeguard the individual's wishes. It was important for the article to stipulate clearly the individual's expressed opposition, to ensure that he was not subjected to moral pressure from the authorities. It was clear that the amendment did not, as the Nigerian representative had suggested, cover the same ground as other sub-paragraphs.

13. Mr. SRESHTHAPUTRA (Thailand) opposed the amendment by the Federal Republic of Germany because he considered that the rights vested in consuls under the convention should not be extended to persons other than consular officials. The amendment went even further, in proposing to extend the right referred to in paragraph 1 (*c*) to other persons, regardless of nationality. It was sometimes difficult for the receiving State to verify the authority of persons claiming to act on behalf of consuls.

14. Mr. ALVARADO GARAICOA (Ecuador) supported the Spanish amendment because it established the freedom of action of the individual.

APR-10-98 10:15 FROM:LEGAL ID:7367555 PAGE 1



15. Mr. LEVI (Yugoslavia) opposed the amendment by the Federal Republic of Germany because it was too wide in scope and because it was not compatible with national law which allowed prisoners to be visited by members of their families, their lawyers and their consuls, but by no one else. He did not think the amendment could be interpreted in the way the representative of Italy had suggested; in any case, an explanation would not suffice: the amendment would have to be more clearly drafted. The Spanish amendment was logical but unnecessary, for if the national concerned did not wish to see his consul, the consul would not obtain the necessary permission from the competent authorities. He would not vote against the amendment, but would prefer to see it withdrawn.

*The amendment by the Federal Republic of Germany (A/CONF.25/C.2/L.74) was rejected by 37 votes to 11, with 18 abstentions.*

*The Spanish amendment (A/CONF.25/C.2/L.114) was adopted by 18 votes to 16, with 33 abstentions.*

*The Belgian amendment (A/CONF.25/C.2/L.25) was adopted by 38 votes to 8, with 19 abstentions.*

*Paragraph 1 (c), as amended, was adopted by 57 votes to none, with 13 abstentions.*

16. Mr. BLANKINSHIP (United States of America) inquired if it would be in order to propose the insertion of the word "prison" before "custody" in the last sentence of paragraph 1 (*c*) so that it should conform to the first two sentences.

17. The CHAIRMAN assured the United States representative that the point would be considered by the drafting committee.

*New sub-paragraph*

18. The CHAIRMAN invited the Committee to consider an amendment by France (L.131) for the insertion of a new sub-paragraph between sub-paragraphs (*b*) and (*c*).

19. Mr. HEUMAN (France) said that the effect of sub-paragraph (*b*) as drafted would be that although the consul was informed of nationals in prison he would not be notified of their release. He was therefore proposing that in addition to the receiving State's obligation under sub-paragraph (*b*), consuls should be entitled to request periodically a list of nationals of the sending State under detention. The new sub-paragraph could equally well be placed at the end of paragraph 1 and he would be open to suggestion on that point.

20. The most important part of his amendment, and no doubt the most controversial, was the last phrase: "except for those who object to such information concerning them being communicated to the consulate." In that respect its motives were similar to those of the Australian amendment to sub-paragraph (*a*), the United States amendment to sub-paragraph (*b*), the Spanish amendment to sub-paragraph (*c*) and the Swiss amendment which would be discussed under paragraph 2. The adoption of the Spanish amendment and the rejection of the others was a remarkable contradiction. If any representative wished to propose a separate vote on the last part of his amendment he would not oppose it.

21. Mr. LEVI (Yugoslavia) supported the first part of the French amendment but opposed the second part because it contained a principle which had been discussed but rejected in connexion with sub-paragraph (*b*). He asked for a separate vote on the last phrase of the French amendment.

22. Mr. PEREZ HERNANDEZ (Spain), referring to the French representative's comments, did not agree that the Committee had acted inconsistently. His own amendment was concerned with the freedom of the individual; the others related to the safeguards which provided the essential basis of protection for a national abroad. He would accept the first part of the French amendment because it strengthened the safeguards, but he could not accept the second part because it would hinder actions that were prerequisites to protection. He therefore supported the request for a separate vote.

23. Mr. BOUZIRI (Tunisia) supported the first part of the French amendment. He opposed the second part because it conflicted with the other sub-paragraphs which had been adopted. Moreover, it raised the question of proof that the national concerned really objected to information being given concerning himself.

24. Mr. MARESCA (Italy) said that the French amendment was a necessary addition to article 36; the consulate would be supplied with complete information. The periodical list would show not only which nationals had been detained but whether or not they were still under detention. It would also allow consuls to assess the standard of behaviour of the nationals of the sending State in the receiving country. The second part of the French amendment would, however, nullify the principle that the authority of the consulate must be recognized by its nationals in the receiving State. His delegation would oppose the second part of the amendment, and would support the motion for division of the vote.

25. Mr. RUSSELL (United Kingdom) said that his delegation supported the first part of the amendment, which would be a valuable addition to article 36. A periodical list would be in the interests of the individual, and conducive to the effective conduct of consular business. His delegation would, however, oppose the second part of the amendment because the principle it contained was in itself undesirable, and because it was clearly inconsistent with sub-paragraph (*b*) as approved by the Committee at its previous meeting. He therefore supported the motion for a separate vote.

26. Mr. SALLEH bin ABAS (Federation of Malaya) said that the amendment would place too heavy an obligation on the authorities of the receiving State in addition to their responsibilities under sub-paragraph (*b*). It would not be difficult for the consulate itself to prepare a list if it wished to do so, since it would in any event be notified of the persons detained. There seemed no reason to transfer the responsibility for compiling the list to the competent authorities of the receiving country.

27. Mr. LEE (Canada) expressed his entire agreement with that view. Although the French amendment perhaps represented an ideal objective, there were a number of practical objections to it. The obligations imposed on the receiving State by sub-paragraph (*b*) were quite sufficient. The additional responsibility proposed by France would require special police clerks to keep the list up to date. The receiving State would have no control over the frequency with which lists could be requested by the consulate since the period was not specified. A further difficulty arose from the fact that " the nationals of that State who are detained " could be interpreted to mean all such nationals in the receiving State, including those outside the consular district of the consulate concerned. A consulate in a capital could, for example, request a list of all nationals detained throughout the territory of a receiving State in which the sending State maintained several other consulates. The inclusion of the proviso at the end of the paragraph would mean, moreover, that a check would have to be made each time in case any detained person had changed his mind, since the last list was submitted, about the communication to the consulate of information concerning him.

28. Mr. SRESHTHAPUTRA (Thailand) shared the views expressed by the representatives of the Federation of Malaya and Canada. His delegation could not accept the French amendment for the same reason as he had given when sub-paragraph (*b*) was under discussion — namely, that his government would have practical difficulties in carrying out such an obligation.

29. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) asked whether it was in order for the Committee to discuss the insertion of a new sub-paragraph between sub-paragraphs (*b*) and (*c*), which had already been approved.

30. The CHAIRMAN replied that it would be for the drafting committee, in considering article 36 as a whole, to decide on the order of the sub-paragraphs, including that proposed by France should it be approved.

31. Mr. KONSTANTINOV (Bulgaria) said that it would be excessive to require the authorities of a receiving State to furnish a list of nationals of whose detention the consulate would have been informed already under sub-paragraph (*b*). The second part of the French amendment contained a proposal already rejected by the Committee in the Australian oral amendment to sub-paragraph (*a*) and in several amendments proposed to sub-paragraph (*b*). The Swiss proposal to insert a new paragraph providing that the application of sub-paragraphs (*b*) and (*c*) should be subject to " the freely expressed wish of the national of the sending State who is in prison, custody, or detention " again sought to insert that same rejected notion in the text of article 36. Unless the rules of procedure could be applied to prevent the constant rediscussion of proposals which had been considered and rejected, the work of the Committee would never end.

32. The CHAIRMAN said that he had been giving serious consideration to the point raised by the representative of Bulgaria. Rule 33 of the rules of procedure provided that when a proposal had been adopted or rejected it might not be reconsidered unless the Conference decided to do so by a two-thirds majority of the representatives present and voting. That rule did not, however, apply to the French amendment since the suggestion in question had first been rejected by the Committee in connexion with sub-paragraph (*b*), and subsequently accepted in sub-paragraph (*c*) by the adoption of the Spanish amendment. He would, however, rule that in so far as it concerned sub-paragraph (*b*), the Swiss amendment (L.78) would amount to the reconsideration of a proposal, and could not therefore be discussed by the Committee unless it decided to do so by a two-thirds majority; in so far as the Swiss amendment concerned sub-paragraph (*c*) it should be considered by the drafting committee, since there was in his view no fundamental difference between the Swiss amendment and the Spanish amendment to sub-paragraph (*c*) which had been adopted by the Committee.

33. Mr. BOUZIRI (Tunisia) said that the Spanish amendment was fundamentally different. It presupposed that the detention was known to the consulate, and did not affect the principle that the consulate must be informed by the consular authorities of the receiving State: only after that information had been communicated could the detained person exercise his right, in accordance with the principle of the freedom of the individual, to refuse to allow the consular officials to take action on his behalf. The French amendment, on the other hand, would allow the names of detained persons to be withheld from the consulate.

34. Mr. SERRA (Switzerland) said that his delegation had noted the Chairman's views on the decisions taken by the Committee in regard to sub-paragraphs (*b*) and (*c*) of article 36 and the conclusions he had drawn from those decisions. Although the proposals approved by the Committee were closely related to the intention of his delegation in submitting its amendment, the principle that his delegation has wished to see affirmed in the draft convention had been only partly covered. In conformity with the Chairman's ruling, his delegation withdrew its amendment (L.78). It requested, however, that it should be noted in the summary record that the Swiss authorities, desirous of continuing their past and present practice, could not accept any undertaking whereby due account was not taken of the freely expressed wish of the persons concerned.

35. With regard to the French amendment he would welcome further explanation of the word " periodically ". If the period between reports was too long the proposed provision would be made inoperative.

36. Mr. SPYRIDAKIS (Greece) said that the first part of the French amendment was logical and would assist consulates in their work. It would improve the draft by strengthening the protection which could be afforded to detained persons. The administrative difficulties which it might create for certain countries did not constitute a sufficient reason for opposing the amendment, which it was essential to include in the text of the convention. His delegation supported the motion for a separate vote.

37. Mr. DAS GUPTA (India) supported the view of the representatives of Canada and the Federation of Malaya that the French amendment as drafted was unacceptable, because the first part would lay an onerous and unnecessary administrative burden on the authorities of the receiving country without in any way improving the situation, already covered by sub-paragraph (*b*); it would also create difficulties with regard to the jurisdiction of the consulate, which was established to look after nationals in a particular area and not throughout the territory of a receiving State. It was possible that detained persons might be moved from one prison to another in a different consular district, and it would be superfluous to have to notify the consulate each time. The second part of the amendment was in opposition to the first part and contradicted the provisions of sub-paragraph (*b*). Friction would arise between States as to who was to judge, and who to verify, whether the persons concerned had objected to information concerning them being communicated to the consulate.

38. Mr. PETRENKO (Union of Soviet Socialist Republics) agreed with those representatives who had pointed out the extra administrative work the French proposal would entail; it might be particularly onerous for federal States such as the Union of Soviet Socialist Republics and the United States of America. The duty of the competent authorities to notify the consulate was clearly stated in sub-paragraph (*b*). It was unnecessary to go further and undesirable to introduce contradictions in the text. The second part of the amendment would open the way to abuse and should be rejected for the same reasons as those for which the similar amendments to sub-paragraph (*b*) had been rejected.

39. Mr. MOUSSAVI (Iran) said that his delegation would vote for the first part of the French amendment, but opposed the second part. There was a considerable difference between the Spanish amendment, the principle of which had been approved by his delegation, and the second part of the French amendment.

40. Mr. SHITTA-BEY (Nigeria) supported the first part of the French amendment; it signified an additional obligation on the receiving State, but would make for accuracy and administrative convenience. It would enable the sending State to request a periodical list of detained persons even although there had been failure on the part of the receiving State to discharge its obligations under sub-paragraph (*b*). His delegation could not support the second part of the amendment.

41. Mr. HEUMAN (France) said that reference to "arrest", which was usually of brief duration, had been specifically avoided in the proposed new sub-paragraph which concerned detention, usually more permanent: the extra administrative work which some members feared would accordingly be reduced. The possibility of allowing the consulate itself to compile the list, as the representative of the Federation of Malaya had suggested, had been considered. But the burden placed on the competent authority by sub-paragraph (*b*) was so great that it could not be carried out adequately; a list compiled by the consulate from the information received under that sub-paragraph would therefore be incomplete, and could not be kept up to date, since there was no obligation on the receiving State to notify the consulate of the release of detained persons. As for the objection that the proposed sub-paragraph would extend beyond the boundaries of a consular district, it was intended that the paragraph should be inserted after sub-paragraph (*b*); it would therefore be governed by that sub-paragraph, which referred to "district". His delegation would, however, have no objection to the addition of the words "within its district" in the proposed new sub-paragraph.

42. It was true that the word "periodically" was vague, but a definition of the period between reports was a matter for agreement between the local authorities and a particular consulate rather than for an international convention. His delegation would, however, have no objection to the deletion of the word "periodically".

43. The CHAIRMAN said that since no objection had been raised to the motion for division of the vote on the French amendment (A/CONF.25/C.2/L.131), he would put the first part of the amendment to the vote:

"The competent authorities shall further be required, on request by the competent consulate of the sending State, to communicate to it periodically a list of the nationals of that State who are detained."

*The first part of the amendment was adopted by 31 votes to 29, with 7 abstentions.*

44. The CHAIRMAN put to the vote the second part of the French amendment: "except for those who object to such information concerning them being communicated to the consulate".

*The second part of the amendment was rejected by 45 votes to 9, with 15 abstentions.*

45. Mr. PEREZ-CHIRIBOGA (Venezuela) explained that his delegation had voted against the whole French amendment for the reasons given by the representatives of Canada and the Federation of Malaya.

*Paragraph 1*

46. The CHAIRMAN invited the Committee to consider paragraph 2 of article 36 and the amendment to it submitted by the United Kingdom (L.107).

47. Mr. EVANS (United Kingdom) said that, in the discussion of article 36, he had already indicated the importance attached by his delegation to the statement of clear and unequivocal obligations, and on the whole the Committee had supported that idea. Paragraph 2 began by stating that the rights referred to in paragraph 1 "shall be exercised in conformity with the laws and regulations of the receiving State" but then went on to the proviso that the said laws and regulations "must not nullify these rights". In his delegation's view, the terms of the proviso were very unsatisfactory. It was obviously important that nothing should be said in paragraph 2 which would render ineffective the provisions already agreed to in paragraph 1. The words in question would, however, appear to be open to the literal interpretation that the laws and regulations of the receiving State could be allowed to impair the rights referred to in paragraph 1, and that the only proviso

was that they must not render those rights completely inoperative. It was realized that consulates must comply with laws and regulations on such matters as prison visiting and what might be given to the prisoner. It was of the greatest importance, however, that the substance of the rights and obligations in paragraph 1 must be preserved. His delegation had therefore proposed in its amendment that the proviso at the end of paragraph 2 should be re-drafted to provide " that the said laws and regulations must enable full effect to be given to the purposes for which the rights agreed under this article are intended ".

48. Mr. AVAKOV (Byerolussian Soviet Socialist Republic) said that the International Law Commission's draft of article 36 represented a reasonable compromise between the interests of the sending State, with the duty of its consulates to protect its nationals, and those of the receiving State, concerned with the safeguarding of its own country. The United Kingdom amendment to paragraph 2 was not acceptable as it was less clear than the International Law Commission's draft; it would weaken the text by making it less imperative and introduce the idea that a government should exercise limitation of its own laws and regulations.

The meeting rose at 1.5 p.m.

## NINETEENTH MEETING

*Monday, 18 March 1963, at 3.20 p.m.*

*Chairman:* Mr. GIBSON BARBOZA (Brazil)

**Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6 (*continued*)**

*Article 36* (Communication and contact with nationals of the sending State) (*continued*)

*Paragraph 2*

1. The CHAIRMAN invited the Committee to continue its consideration of article 36, paragraph 2, and of the United Kingdom amendment (L.107) to that paragraph.

2. Mr. DAS GUPTA (India) said that the second part of paragraph 2 might raise difficulties of interpretation. He would prefer the wording proposed by the United Kingdom in its amendment (L.107), which was an improvement on the International Law Commission's draft.

3. Mr. ANGHEL (Romania) said that he agreed with the principle stated in article 36, paragraph 2, but considered the wording obscure and difficult to interpret, especially in view of the differences in existing legislation. The two phrases contained two different criteria. The United Kingdom amendment did not improve the text. Did it mean that States signing the Convention would have to change their laws in order to permit the full exercise of the rights in question? He did not think that was meant by either the United Kingdom amendment or the International Law Commission's draft. Under the legislation of various countries, aliens were subject to the penal laws of the receiving State in the same way as nationals of that State. The law differed from country to country, and the receiving State could hardly be expected to accord privileged status to aliens. The second part of paragraph 2 should preferably be deleted.

4. Mr. MARESCA (Italy) said that the second part of paragraph 2 contained a recommendation that was difficult to interpret. The United Kingdom amendment proposed a more precise wording for which the Italian delegation would be prepared to vote.

5. Mr. PEREZ HERNANDEZ (Spain) likewise expressed support for the United Kingdom amendment, which conformed to the principle that international law prevailed over municipal law. There was no intention, as feared by the Romanian delegation, of according a privileged status to aliens. In all the countries represented at the Conference, citizens were equal before the law, but by reason of his status the alien needed the assistance and protection of a consul in certain respects. The United Kingdom amendment expressly safeguarded the exercise of the rights referred to in article 36, paragraph 1, and should therefore receive the Committee's assent.

6. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that sub-paragraphs (*a*), (*b*) and (*c*) of article 36, paragraph 1, specified in what circumstances consular officials and nationals of the sending State could best communicate with each other. Paragraph 2 stipulated that the exercise of the rights conferred by paragraph 1 was subject to the laws and regulations of the receiving State, a provision fully consistent with accepted international practice, but the usefulness of the last part of the paragraph was debatable.

7. The United Kingdom amendment tended to weaken paragraph 2 still further, but did not provide for the case of a conflict between the rights defined in paragraph 1 and the laws and regulations of the receiving State. Would the consul's rights be violated, for instance, if he wished to pay a visit to one of his nationals in prison on a day on which the prison rules obtaining in the receiving State did not allow visits? The Ukrainian delegation was unable to support the United Kingdom amendment.

8. Mr. PETRENKO (Union of Soviet Socialist Republics) said that paragraph 2 was an important provision, for it laid down the conditions under which the rights conferred by paragraph 1 could be exercised. From the summary records of the twelfth and thirteenth sessions of the International Law Commission, it was clear that its object had been to safeguard the interests of the sending State and of its consular officials without infringing the respect due to the sovereignty of the receiving State. Those discussions had resulted in the unanimous adoption of a compromise provision, which should be acceptable to the great majority of States. Admittedly, paragraph 2 did not solve all the problems which might arise, but he considered that the International Law Commission's draft offered the most satisfactory wording.

9. The object of the United Kingdom amendment seemed to be to relieve consular officials of their duty to conform to the laws and regulations of the receiving State; yet surely, it was patent that laws and regulations varied from country to country. The Commission on Human Rights was currently drafting an instrument on arbitrary arrest, one of the most interesting features of which was that it took account of the differences in law as between States. The Romanian representative had quite rightly pointed out that aliens should not enjoy a status more favourable than that of citizens; the United Kingdom amendment, if adopted, would in effect restore the system of capitulations.

10. Mr. EVANS (United Kingdom), replying to the various criticisms relating to his delegation's amendment, said that the new provision proposed was longer than that in the draft article because his delegation considered clarity to be preferable to conciseness. The Romanian representative had expressed the fear that the effect of the amendment would be to give a privileged status to aliens; but after all it was precisely with aliens and their rights that article 36 was concerned. The Ukrainian delegation had implied that municipal law should prevail over international law; but that objection could not apply to the rights recognized in paragraph 1 of article 36.

*The United Kingdom amendment (A/CONF.25/C.2/L.107) was adopted by 42 votes to 14, with 11 abstentions.*

*Paragraph 2, as amended, was adopted by 47 votes to 10, with 12 abstentions.*

11. Mr. JESTAEDT (Federal Republic of Germany) said that he had voted against the United Kingdom amendment, not because he opposed its underlying principle, but because he considered that the International Law Commission's wording provided better safeguards for the principles stated in article 36, paragraph 1.

12. Mr. ANGHEL (Romania) said he had voted against the second part of article 36 as it stood, for the reasons he had already explained.

13. Mr. KANEMATSU (Japan) said that his delegation had abstained because it considered that, in so difficult a technical problem, the United Kingdom amendment might give rise to misunderstanding, since it did not make it clear whether national or international law was to prevail.

*Article 36 as a whole, as amended, was adopted by 42 votes to none, with 27 abstentions.*

14. Mr. WOODBERRY (Australia), explaining his delegation's abstention, pointed out that neither in sub-paragraphs (*a*) or (*b*), nor in the new sub-paragraph of paragraph 1, was any specific reference made to the right of an individual to decide on the extent of his relations with the consular representatives of the State of nationality, although paragraph 1 (*c*) contained what might be interpreted as such a provision. Secondly, the Australian delegation wished to reiterate its understanding that the word "freedom" in paragraph 1 (*a*) should be construed in the sense of "option". Thirdly, in introducing his proposal for a new sub-paragraph between sub-paragraphs (*b*) and (*c*), the French representative had led the Australian delegation to understand that the object of the proposal was not to place an additional burden on receiving States, but rather an obligation on those receiving States which thought themselves unable to comply with the provisions of sub-paragraph (*b*).

15. Mr. HEUMAN (France) said that his delegation had abstained for the reasons already explained when the Committee had voted on paragraph 1 (*b*). Furthermore, it was paradoxical that the Committee should have rejected the right to refuse in sub-paragraph (*b*) and in the second part of the French amendment, but not in sub-paragraph (*c*). Thirdly, paragraph 2, as amended by the adoption of the United Kingdom amendment, was unacceptable to the French delegation because it set too strict a limitation on national law.

*Article 37* (Obligations of the receiving State)

16. The CHAIRMAN invited debate on draft article 37 and on the amendments thereto.[1] In view of the fact that the amendments by the United States of America (L.4) and Thailand (L.66) were identical, he suggested that the sponsors might agree to treat them as a joint amendment.

17. Mr. SRESHTHAPUTRA (Thailand) accepted that suggestion.

18. Mr. BLANKINSHIP (United States of America), also agreeing, said that his delegation proposed the deletion of sub-paragraph (*a*) on the ground that it was unnecessary to impose on the receiving State the duty to inform the consulate of the death of a national of the sending State. That would be an excessive obligation and of no practical value. The question of reporting deaths to the consulate was not so serious as to require an express provision in the convention. In the United States, for example, at least in some States, there were no means of tracing the movements of aliens and hence it might be difficult to notify the consulate. In view of those considerations, sub-paragraph (*a*) was unacceptable to his delegation. For similar reasons, sub-paragraph (*b*) was superfluous; a reference to the appointment of a guardian or trustee for a national who was a minor would be out of place in the convention.

19. Mr. WASZCZUK (Poland) said that his delegation attached great importance to the provision concerning the notification of deaths. The deceased's family, who were usually in the country of origin, had be to informed. Moreover, the obligation was laid down in many bilateral conventions, in particular in article 10 of the Consular Convention of 30 December 1925 between Poland and France.[2] His delegation had origi-

[1] The following amendments had been submitted: United States of America, A/CONF.25/C.2/L.4; Austria, A/CONF.52/C.2/L.49; Brazil, A/CONF.25/C.2/L.63; Thailand, A/CONF.25/C.2/L.66; Federation of Malaya, A/CONF.25/C.2/L.76; Ireland, A/CONF.25/C.2/L.77; Switzerland, A/CONF.25/C.2/L.79; Romania, A/CONF.25/C.2/L.93; Poland, A/CONF.25/C.2/L.94; India, A/CONF.25/C.2/L.113; Australia, A/CONF.25/C.2/L.144.

[2] League of Nations, *Treaty Series*, vol. LXXIII, No. 1719.

# APPENDIX E

they could not seek to rely on the law of the State whose flag they were flying, since those acts were committed "for personal ends". This decision was deduced simply "from the pursuit by the applicant of the objects set out in its articles of association". The Court of Appeal concluded that in fact personal motives such as hatred, the desire for vengeance or the wish to take justice into their own hands are not excluded in this case and that there is no provision of municipal or international law imposing any restriction on the competence of the Belgian courts to take "with regard to their own nationals" measures to protect their free right of passage and their lawful activities and even if necessary to pronounce a civil sanction to ensure respect for the freedoms granted to all persons. [The appellant therefore considers] that the Court of Appeal has failed to provide a proper legal justification for its decision (violation of the provisions of the Geneva Convention cited in the grounds of appeal).

[This Court considers] that Article 15 of the Geneva Convention of 29 April 1958 on the High Seas, ratified by the Law of 29 July 1971 provides

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation committed for private ends by the crew or the passengers of a private ship

In the judgment under appeal it was held that the applicants

committed on the high seas acts falling under the application of the notion of "piracy", from which it follows that they are not entitled to invoke the law of the State whose flag they are flying.

That decision is based on the consideration

that the acts in question were committed for personal ends, in particular the pursuit by the applicant of the objects set out in its articles of association.

It is held in the judgment

that the action was taken by the applicants with a view to alerting public opinion to the dangers inherent in the discharge at sea of waste products harmful to the environment.

The applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State or a State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective.

On the basis of these considerations the Court of Appeal was entitled to decide that the acts at issue were committed for personal ends within the meaning of Article 15(1) of the Convention. The ground of appeal is therefore unfounded in law.

For these reasons the appeal is dismissed and the applicants are ordered to pay the costs.

[Report: *European Transport Law*, 1987, p. 98 (in French).]

**Aliens — Treatment — Access to consul — Whether alien possesses a right to have consul informed of his arrest — Whether failure to inform consul renders criminal proceedings a nullity**

**Consular relations — Position and functions of consul — Access to nationals under arrest — The law of Italy**

*Re* YATER

*Italy, Court of Cassation* 19 *February* 1973

SUMMARY: *The facts* —Yater, a British national, was arrested in Italy for criminal offences and brought to trial without the British Consul being informed either of his arrest or of the proceedings instituted against him. Counsel for the defence claimed that his rights of defence had consequently been violated and maintained that the proceedings were a nullity.

*Held* —The plea was dismissed.

Article 36(1) of the Vienna Convention on Consular Relations, 1963, required that consular officers should be notified of the arrest of a national of the sending State, if he so requested, and that they should have the right to visit the national and to arrange for his legal representation. With regard to legal representation the effect of this provision was that consular authorities could take an interest in appointing counsel to represent an accused in criminal proceedings. This power was, however, a subsidiary intervention which did not replace the right of an accused person to provide for his own defence. Where an accused himself obtained defence counsel to his own satisfaction, procedural rules with regard to his defence were not violated by the failure to inform the relevant authorities of his arrest.

The following is the text of the relevant part of the judgment of the Court:

... In his third plea Dr Candotti, Counsel, pleads the nullity of the proceedings because the British Consul had not been notified. This reason is unfounded as no rule of municipal law imposes such a requirement. Article 19 of the Italo-British Consular Convention, concluded in Rome on 1 June 1954, and ratified by Law No. 298 of 7 March 1957, empowered the Consul to talk and provide assistance

to the accused, obtain information and have contacts with the prosecuting authorities and conferred on him the right to be informed of the fate of detention of any national of the sending State, to visit the accused in prison and speak with him. Article 36 of the Convention on Consular Relations, adopted in Vienna on 24 April 1963, adhered to by Italy and Great Britain, and ratified by Law No. 804 of 9 August 1967, establishes the obligation to inform the consular office of the State to which the person arrested or detained belongs, as long as this person has requested such notification, and to pass on to the same office any communication addressed to it by such person. It has moreover recognized the right of the consular authority to approach the person arrested or detained, confer and correspond with him and provide for his legal representation. Only the latter provision needs a detailed interpretation. The others are readily understood.

The phrase *pourvoir à sa représentation en justice* should be understood in the sense that the consular authorities may take an interest in appointing a counsel to assist or represent the accused in the criminal proceedings, provided that the procedural law of the place requires or admits assistance or representation for the exercise of his procedural rights.

This power must be understood as a complementary and subsidiary intervention which does not replace the accused's right to provide for himself a trusted legal representative for his defence. Nor is it necessary for the accused to acquire capacity since a foreigner is fully entitled to exercise the rights of defence on equal terms with the native citizen.

Consequently there can be no violation of the procedural rules regarding the accused's defence as a result of failure to inform the said authority and because the latter did not contribute towards the defence of the accused who already has counsel of his own trust and does not feel the need for another ...

[References: *Rivista di diritto italiano*, 1974, p. 833 (in Italian); *Italian Yearbook of International Law*, 1976, p. 330 (English translation).]

**Relationship of international law and municipal law — Recognition and enforcement of foreign laws — Expropriation legislation allegedly contrary to international law — Whether entitled to recognition in Italian courts — Public policy — Act of State doctrine — Whether Italian courts entitled to question compatibility of expropriation legislation with international law — "Pursuit actions" — Ownership of oil extracted from concession area after expropriation of concession — Ownership governed by *lex rei sitae* — Property in oil only acquired on extraction — Whether extraction pursuant to allegedly unlawful expropriation confers title**

**Expropriation — Compensation — Lack of effective compensation — Discrimination — Whether expropriation unlawful — Effect of unlawful expropriation — Whether a nullity — Whether ownership of expropriated property affected — Ownership of oil extracted from concession area after expropriation of concession — The law of Italy**

BP EXPLORATION COMPANY (LIBYA) LTD *v*
ASTRO PROTECTOR COMPANIA NAVIERA SA, SINCAT AND LISOCO

*Italy, Court of Syracuse — 12 March 1973*

SUMMARY: *The facts.* — In 1957 Nelson Bunker Hunt was granted Concession No. 65 ("the Concession") to explore, extract and sell oil in a designated area of Libya. In 1960 the BP Exploration Company (Libya) ("BP") acquired a half share in the Concession. On 7 December 1971, without notice, the Libyan Government enacted a law nationalizing the Concession and transferring it to the State-owned Arab Gulf Exploration Company. This was said to be in retaliation for action taken by the British Government in the Gulf. BP argued that the nationalization was null and void on the ground that it was discriminatory and failed to provide for the payment of equitable compensation within a reasonable time. BP therefore claimed that it continued to be entitled to a share in any oil extracted from the Concession area. On 11 December 1971 arbitration proceedings were instituted by BP.[1] On 30 December 1971, having obtained information that a cargo of crude oil on board a tanker bound for a refinery terminal in Italy originated from the Concession area, BP successfully applied to an Italian judge for the provisional attachment of samples of the oil on board the vessel and the documents identifying the origin of the cargo, in order to enable BP subsequently to assert title to the oil. In January 1972 BP instituted proceedings for the confirmation of the attachment and for recovery of the oil. Sincat, the Italian company responsible for refining the oil cited in the writs, argued

[1] In an award rendered on 10 October 1974, Judge Lagergren held that the Libyan Government was in breach of its contractual obligations under the Concession but refused to make a declaration that the claimant was the owner of oil extracted after the date of nationalization (*BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, 53 I.L.R. 297).

# APPENDIX F

**THE SECRETARY OF STATE**

**WASHINGTON**

April 13, 1998

Dear Governor Gilmore:

I am writing to request a stay of the execution of Angel Francisco Breard, who is sentenced to be executed by the Commonwealth of Virginia tomorrow, April 14.

The United States has throughout vigorously defended Virginia's right to go forward with the sentence imposed on Mr. Breard by Virginia's courts. Counsel for the U.S. Government argued strongly before the International Court that the Court should not issue the relief sought by Paraguay. We maintain, for the reasons we presented to the Court at its hearing last week, that consular notification would not have changed the outcome and that the Vienna Convention on Consular Relations does not require that Mr. Breard's conviction and sentence be vacated.

The International Court, however, was not prepared to decide the issues we raised in its urgent proceedings last week. Using non-binding language, the Court said that the United States should "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." The Court concurrently set an expedited briefing schedule in the case, apparently intending to hold its final hearing this fall.

In light of the Court's request, the unique and difficult foreign policy issues, and other problems created by the Court's provisional measures, I therefore request that you exercise your powers as Governor and stay Mr. Breard's execution. It is only with great reluctance that I make this request, especially given the aggravated character of the crime for which Mr. Breard has been convicted and sentenced and our view of the merits of Paraguay's legal claims. As Secretary of State, however, I have a responsiblity to bear in mind the safety of Americans overseas.

The Honorable
James S. Gilmore III,
Governor of Virginia,
Richmond, Virginia.

I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention. The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or travelling abroad.

I appreciate the difficulty of this matter. The Legal Adviser of the Department, David Andrews, will call your Counselor, Mr. David Anderson, regarding it.

Over the past year, the Department of State has worked with all of the States to improve the regime of consular notification. We appreciate the cooperation we have received from the Commonwealth on these issues.

Sincerely,

Madeleine Albright

Madeleine K. Albright

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

ANGEL FRANCISCO BREARD, )
Petitioner, )
v. )
)
FRED W. GREENE, Warden, )
)
Respondent. )
)

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

Petitioner, Angel Francisco Breard, by counsel, and upon the accompanying Affidavit, asks for leave to file his Petition for Writ of Certiorari submitted herewith without payment of costs and to proceed *in forma pauperis*. Leave to proceed *in forma pauperis* was granted in the United States District Court for the Eastern District of Virginia by Order dated April 29, 1996.

Respectfully submitted,

ANGEL FRANCISCO BREARD
By Counsel

Alexander H. Slaughter
ander H. Slaughter (VSB #05916)
n G. Broaddus (VSB #05284)
y C. Young (VSB #31155)
RE, WOODS, BATTLE & BOOTHE LLP
es Center, 901 East Cary Street
d, Virginia 23219-4030
5-1000

FILE COPY
UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
February 18, 1998

No. 96-25
CA-96-366-3

ANGEL FRANCISCO BREARD

Petitioner - Appellant

v.

SAMUEL V. PRUETT, Warden, Mecklenburg Correctional Center

Respondent - Appellee

---

THE HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

Amicus Curiae

---

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

Patricia S. Connor

/s/ Patricia S. Connor

CLERK

No. 97-8214
A-___

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**October Term, 1997**

**ANGEL FRANCISCO BREARD,**

**Petitioner**

**v.**

**FRED W. GREENE, WARDEN,**

**Respondent**

CERTIFICATE OF SERVICE

I, Donald R. Curry, Senior Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 18th day of March, 1998, I mailed, by overnight mail, an original and ten (10) copies of the Respondent's Brief in Opposition to the Clerk of this Court and one copy of the same to Alexander Slaughter, McGuire, Woods, Battle & Boothe, One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030, counsel for petitioner.

Donald R. Curry
Senior Assistant Attorney General

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

ANGEL FRANCISCO BREARD, )
Petitioner, )
v. )
)
FRED W. GREENE, Warden )
Respondent. )

**AFFIDAVIT IN SUPPORT OF**
**MOTION TO APPEAL IN FORMA PAUPERIS**

COMMONWEALTH OF VIRGINIA )
COUNTY OF MECKLENBURG ) ss:

I, Angel Francisco Breard, being duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor and that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. I am the petitioner in the case of Breard v. Greene, a post-conviction proceeding from judgement of a state court sentencing me to death, and awaiting immanent execution on April 14, 1998.

2. I am presently incarcerated at Mecklenburg Correctional Center, Boydton, Virginia. I am employed.

BEST AVAILABLE COPY

McGuireWoods
Battle & Boothe LLP

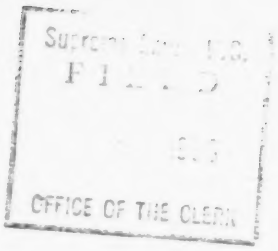
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030
Telephone/TDD (804) 775-1000 • Fax (804) 775-1061

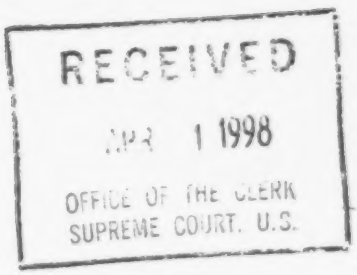
ALEXANDER H. SLAUGHTER
Direct Dial (804) 775-4346

Direct Fax (804) 698-2174
E-mail ahslaugh@mwbb.com

March 31, 1998

***VIA FEDERAL EXPRESS***




The Honorable William K. Suter
Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20054

**Re:** **Angel Francisco Breard v. Frank W. Greene**
No. 97-8214

Dear Mr. Suter:

On behalf of the Petitioner. Angel Francisco Breard, we submit the enclosed partial transcript of pre-trial proceedings held on March 3, 1998, in the Circuit Court of Fairfax County, Virginia, in the first degree murder* case of Commonwealth of Virginia v. Elvia Garcia, Criminal No. 93264 (Ms. Garcia is a Mexican*). We direct the Court's attention to pages 14 through 19. The Court's recital reflected by these pages makes clear that:

(1) the Commonwealth of Virginia continues to violate the Vienna Convention in the face of two Fourth Circuit cases, Murphy v. Netherland, 116 F.3d 97 (4th Cir.), *cert. denied*, 118 S. Ct. 26 (1997), and Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998) decided within the last two years where the illegality of its admitted violations was a central issue; and

(2) the trial judge felt constrained, after finding as a fact that the violations had occurred, to nevertheless deny relief based on opinions rendered by the Virginia appellate courts, without making a determination whether the law enunciated in those opinions was consistent with Article 36(2) of the Convention requiring that

*The partial transcript does not reflect the charge against Ms. Garcia or her nationality. We attach an article about the case found in the "Metro Section" of *The Washington Post*, Saturday, March 14, 1998, which recites those facts.

> local law "enable full effect to be given to the purposes for which the rights accorded under this article are intended."

We would appreciate your making this letter and the enclosed transcript available to the Chief Justice and Associate Justices.

I hereby certify that copies of this letter and the enclosed transcript were delivered by hand this 31st day of March, 1998 to Donald R. Curry, Esq., Senior Assistant Attorney General of Virginia, at his office at 900 East Main Street, Richmond, Virginia 23219.

Respectfully yours,

Alexander H. Slaughter

Alexander H. Slaughter

AHS/gw

Enclosure

cc: Donald R. Curry, Esq. (w/enc.)
Michele J. Brace, Esq. (w/enc.)

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

| | | |
|---|---|---|
| COMMONWEALTH OF VIRGINIA, | : | |
| -vs- | : | CRIMINAL NUMBER 93264 |
| ELVIA GARCIA, | : | |
| Defendant. | : | |

Courtroom 5E
Fairfax County Courthouse
Fairfax, Virginia
Friday, March 3, 1998

The above-entitled matter came on to be heard before the HONORABLE STANLEY P. KLEIN, Judge, in and for the Circuit Court of Fairfax County, in the Courthouse, Fairfax, Virginia, beginning at 3:09 p.m.

APPEARANCES:

On Behalf of the Commonwealth:

IAN RODWAY, ESQUIRE
Assistant Commonwealth Attorney

On Behalf of the Defendant:

JOANMARIE DAVOLI, ESQUIRE
ASSISTANT PUBLIC DEFENDER

Also Appearing:

Joanna Barnes, Interpreter

* * * * *

P R O C E E D I N G S

(The Court Reporter was duly sworn.)

THE COURT: Okay. Would you bring the Defendant into the courtroom, please.

(Whereupon, the Defendant was seated next to her counsel.)

THE COURT: Let the record reflect the fact that this is the matter of the Commonwealth of Virginia versus Elvia Garcia, Criminal Number 93264. The Defendant is present with her counsel Ms. Joanmarie Davoli of the office of the public defender. The Commonwealth is represented by Assistant Commonwealth Attorney Mr. Ian Rodway.

The matter is back before the Court this afternoon for the Court to rule on the motion to suppress and the motion to quash the indictment or to suppress previously filed and argued by the defense.

The Court has considered the testimony of each of the witnesses who testified during the course of the hearing and has had the opportunity to consider the controlling authorities and I make the following findings of fact and conclusions of law in part based upon my findings relating to the creditability of the witnesses.

I'm going to make my rulings in the same order that they were argued to me and start off with the challenge to the statements under the fifth amendment to the United States constitution and Ms. Im began her argument by attacking the voluntariness of the statement under the fifth amendment.

The applicable test is not in controversy. It's been oft stated by the United States Supreme Court and the Virginia Appellate Courts, including approximately two weeks ago again in Weber versus the Commonwealth and in Bottenfield versus the Commonwealth, 25 Va. App at 316; "that the Commonwealth has the burden of proof by a preponderance of the evidence that a defendant's confession was freely and voluntarily given. In determining whether a statement or any confession was voluntary, the trial court must decide whether the statement was the product of essentially free and unconstrained choice by its maker or whether the makers will has been overborne and his" -- or in this particular situation her -- "capacity for self determination critically impaired."

And so in deciding, the trial court must look to the totality of all surrounding circumstances. The

Court must consider the defendant's age, intelligence, mental and physical condition, background and experience with the criminal justice system, and the contact with the police and the circumstances of the interview, "because only state action may violate a criminal defendant's due process rights, cohesive police activities are a necessary predicate for the finding that a confession is not voluntary, within the meaning of the due process clause of the fourteenth amendment."

Most of the testimony produced in support of the defendant's position on this issue came from Dr. Gloria Morota. In the Court's view, even if the Court were to totally credit Dr. Morota's testimony, most of what she said relating to the voluntariness issue were related to general characteristics of people from Hispanic backgrounds that one might expect to find present.

She did speak specifically to this Defendant's educational level, lack of a culturation, lack of sophistication, but when it came to whether this Defendant was afraid for her safety at the time that she was interviewed by the police department, I heard nothing from Dr. Morota, although Dr. Morota had had the opportunity to interview Ms. Garcia and even more importantly to the

Court, I never heard anything from Ms. Garcia, herself, when she testified that she was in any way afraid at the time of the interview, that she had been subject to the type of abuse that Dr. Morota testified to as far as her experience in other people with backgrounds that are somewhat similar with to this defendant.

This defendant showed, during the course of her discussions with the police, that she knew how to say no when there were things that were going on that she did not agree to and there was no testimony from her that would cause this Court to believe that her free will was overborne by any circumstances relating to the statements that she gave.

When I take into consideration each of the factors that are set forth in the test that I previously read, consider the creditability of the testimony of the witnesses, what was said and also what was not said, I find by the greater weight of the evidence that the Commonwealth has satisfied its burden of the voluntariness question and I deny the motion to suppress on that ground.

The next issue that the Court must address is whether when she first made an incriminatory statement to the police, she was in custody thereby causing the Miranda

rights to necessarily have to be given to her prior to the time that a statement could be taken.

Whether someone is in custody for purposes of the fifth amendment is not necessarily akin to whether someone has been seized under the fourth amendment. The test for when someone is in custody for Miranda purposes as far as the present status of the law was perhaps first set out in a Supreme Court's case of California versus Vanhaler (ph). It's been fully set out in a number of cases since that time, including Wass versus the Commonwealth that was argued by the defense and Purkett versus the Commonwealth from our Supreme Court.

Very simply, in determining whether someone is in custody for Miranda purposes, the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Upon questioning by the Court, Ms. Im argued that this wasn't really an objective test, it wasn't a subjective test in her opinion, it was really a hybrid test where the characteristics of an individual defendant must be taken into consideration for purposes of determining whether someone is in custody.

And although the cases do say that in the voluntariness context, the individual characteristics of a defendant must be taken into consideration, they also must be taken into consideration in determining whether someone has knowingly and intelligently waived his or her Miranda rights.

The cases make clear that when determining whether someone is in custody, it is an objective test. As the United States Supreme Court stated in Stansbury versus California at 128 Law Ed 2nd, 292, "our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored either by the interrogating officer or the person being questioned."

That being the test, I have to examine the evidence that was presented to me. The defendant herself testified that she knew what arrest meant. At the time that she left her place of abode with the police officers, she told me that she did not understand at that point that the primary person that she had been speaking to was a police officer or a police detective -- if I remember her testimony accurately -- she was not handcuffed when she

was taken to the station.

When she arrived at the station she told me that she didn't think that she was in a police station, she didn't think Mr. Perez -- who was the primary but not sole person interviewing her -- was a detective.

Detective Perez testified -- in the Court's view credibility -- that he had told the defendant that she was not under arrest and what took place at the police station was consistent with that.

The defendant was allowed to go out in the lobby by herself. She went to the restroom by herself. She testified she didn't see any police cruisers or other indicia that she was in a police station. That she went to the restroom by herself.

There is a contest in the recollections of the defendant and Detective Perez as to whether the defendant had in fact asked to go to home and I find by the preponderance of the evidence the testimony of Detective Perez in that instance was more credible.

I found this Defendant to be a pretty credible witness but I also found Detective Perez to be a credible witness and in listening to the defendant as she testified, there were really two times that she hesitated.

This was one; the other one when there was a clear hesitation in the defendant's testimony was why she went with the police from her home.

And I find Detective Perez's testimony on those issues to be more convincing under the circumstances of this case.

This defendant also testified to me that when she was told that she was under arrest, she understood and she knew what that meant.

When the evidence is looked at objectively, taking into consideration the testimony of each of the witnesses, a reasonable person under these circumstances would not have felt, prior to the time that she was placed under arrest, that she was in fact either under arrest or that her freedom of movement had been effected to the degree associated with a formal arrest.

That being the situation, the Court finds that the Commonwealth -- Well, I'm going to find that the Commonwealth has shown by the greater weight of the evidence that the defendant was not in custody. I do not have to decide under the circumstances of this case whether that's the Commonwealth's burden or the Defendant's burden because I find by the greater weight of

the evidence that she was not in custody when she made the initial incriminatory statement.

I rely on the positions of counsel in regard to when she made incriminatory statements. As I believe I stated on the record at the hearing yesterday, it appears to me -- although no evidence was specifically presented and counsel seemed to agree -- that there was an incriminatory statement made just before she went out into the lobby and before she was advised of her Miranda rights and then she made subsequent incriminatory statements after she was advised of her Miranda rights.

I therefore deny the motion to suppress as to any statements that the defendant may have made prior to the time that she was read her Miranda rights on Miranda grounds because the Court rules that she was not then in custody under the applicable precedent.

I must then turn to the subsequent statement that was made after she was advised of her Miranda rights and the defense argues that she did not knowingly and intelligently waive her Miranda rights.

Again, no one's questioning the applicable law. On this question, here clearly the Commonwealth has the burden of proof by the greater weight of the evidence

to prove that the defendant knowingly, intelligently, and voluntarily waived her Miranda rights.

And in determining whether that it so, here again, I do and must take into consideration individual characteristics of this defendant including her intelligence, her education, her familiarity with the criminal justice system, and the other matters that she testified to, and to some extent the matters that were testified to by Dr. Morota as they applied individually to this defendant.

The other evidence, however, is that the defendant was in fact advised of her Miranda rights which were read to her. She signed a Miranda waiver form, initialing the Miranda waiver form, and then in fact spoke to the police. She had spoken to the police before on prior occasions. She had according to what is obviously not controverted made incriminatory statements to the police in advance of being advised of her Miranda rights and then continued to speak to the police after having been advised of her Miranda rights.

Again there is a complete absence of any direct evidence from the defendant herself that she didn't understand the rights, she didn't understand the

implications.

I am not shifting the burden of proof over to the defendant but when the Commonwealth puts on the evidence that the Commonwealth puts on and the Court finds it credible, absent something causing that to be questioned, there is really no reason for the Court to start assuming that the Defendant didn't understand exactly what she was doing when she did it.

The defendant had the full opportunity when she was testifying during the course of the hearing to explain to me that she didn't understand what she was doing. She told me that she thought that this would basically document the fact that she had spoken to the police officer but there was nothing else that came from the defendant that would belie a conclusion that she understood exactly what she was doing when she decided to speak to the police on that occasion.

When I consider the totality of the evidence, I find by the greater weight of the evidence that the defendant made a knowing, intelligent, and voluntary waiver of her Miranda rights and I therefore deny the motion to suppress the statements that she made to the police after she had been advised of her Miranda rights.

Even if the Court had determined that the defendant was in fact in custody at the time that she made her initial incriminatory statements to the police, the second statement that she made after being given her Miranda rights would be admissible nonetheless even if I had suppressed the initial statement.

This is not a situation where the rule of WonSung (ph) would apply. The United States Supreme Court in Oregon versus Alstead, our Court, our Supreme Court in Boggs versus the Commonwealth, our Court of Appeals on Bonk (ph) and Mundy versus the Commonwealth have stated that unless the initial statement that was elicited pre Miranda warnings was a coerced statement, any illegal taint arising out of that statement can be vitiated by a proper giving of Miranda rights and an exercise of someone's ability to make a statement thereafter.

It is found by this Court that the Defendant was properly advised of her Miranda rights; that the defendant was not coerced in making the statement that she made to the police prior to her being advised of her Miranda rights, and therefore even if I had suppressed the initial statement, under the existing case law the statement that she made after being advised of her Miranda

rights would nonetheless be admissible.

I therefore deny the defendant's motion to suppress in its entirety as argued on fifth amendment grounds.

I then turn my attention to the issue of the motion to quash the indictment or to suppress based upon an alleged violation of the Vienna convention on consulate relations.

This treaty is an international treaty which according to the United States Supreme Court must be regarded in courts of justice as equivalent to an act of the legislature. The United States Supreme Court stated that a long time ago in Foster versus Neilson at 27 U.S. 253, and as a result of that, states and agents of the state are bound to comply with the treaty pursuant to the supremacy clause.

This Judge in this Court shares the opinion and the concerns that were expressed by Senior Judge Butzner in Greer versus Pruitt, record number 96-25, the recent case that was cited by the defense from the United States Court of Appeals for the Fourth Circuit and the dissenting opinion of Judge Takasugi in the United States

versus Calderon-Medin at 591 Fed 2nd 529, at page 532, which was the eleventh -- excuse me, the ninth Circuit case that was cited by the defense.

I find under the circumstances of this case, by the greater weight of the evidence, that the police did not comply with the Vienna convention on consular relations.

I reject Mr. Rodway's argument in part. I read the Law Review article that was cited in the defense memo from the Michigan Law Review. It is unclear what constitutes the type of detaining or custody which would cause the relevant provisions of the treaty to become applicable.

But even assuming that the defendant was not in custody at the time of the initial statements, at the time that she was taken down to the police department under the treaty -- the same way that I've ruled that she was not in custody for purposes of fifth amendment analysis -- it is clear that she was in custody at the time that she made the second statement after she was told by Detective Perez that she was under arrest and Detective Perez had no intention of letting her go.

Therefore there is a violation in the Court's

view of the terms of the treaty. The defense argues that as a result of the fact that the treaty has been violated, I should do either of two things.

The first is to dismiss the indictment and the second is to exercise the exclusionary rule in this context.

There is part of me that finds the argument of the defense extremely appealing but in the final analysis what the defense is asking me to do is because I find that there was a violation of law, of international law, I must therefore violate the law as a remedy.

For me to dismiss the indictment under the circumstances of this case, I would have to ignore precedent from the United States Supreme Court. I'd have to ignore the Supreme Court's decision in Kerr versus Illinois, the Supreme Court's decision in Frisbee versus Collins, and although it is not directly applicable, the analysis of the United States Supreme Court in the more recent case of the United States versus Alvarez Machin (ph) at 504 U.S. 655.

Kerr and Frisbee were cases where people were abducted from foreign countries, brought to the United States and requests were made to dismiss charges and not

allow the defendants to stand trial because of the way that they had been brought into the country.

And the United States Supreme Court in those cases said that is not a proper remedy under those circumstances as they were presented and that the courts do not have the right to preclude someone from being tried in state courts even if the circumstances alleged by the defendants as far as how they were brought before the court were true.

The exclusionary rule is also sought as a possible remedy. There is no authority that is cited to me that would support in invoking the exclusionary rule under these circumstances and the only case that I am aware of where this issue was at all addressed was the United States versus Enger at 472 Fed Sup 490, a 1978 case in the United States District Court for the District of New Jersey where the issue to some extent was addressed and the United States District Court found that no exclusionary rule is explicated by certain provisions of federal law or the Vienna convention.

And neither counsel has, nor have I discovered, any case law on the subject drawn from the decisions of any nation.

And the United States District Court in the that case declined to allow the exclusionary rule to be invoked as an appropriate remedy.

I have cited previously in rendering my decision the decision of the United States Supreme Court which makes a treaty the functionally equivalent of a legislature act.

I can not ignore the decisions repeatedly from the Virginia Appellate Courts that state that a violation of a statute does not rise to the level of the violation of the United States constitution and that the exclusionary rule is limited to situations where the constitution has been violated, not a statue.

That was again most recently set forth by our Court of Appeals in Weber versus Commonwealth, a case from February 17th of this year. It is further set forth in Alatishe versus the Commonwealth at 12 Va App 376 and numerous other cases from the Virginia Appellate Courts.

That being the situation I am bound by the decision of the United States Supreme Court and I am bound by the decisions of the Virginia Appellate Courts.

I therefore can not invoke the exclusionary rule under the circumstances of this case, as a trial

court Judge in the state of Virginia even I felt that the implication of the exclusionary rule was an appropriate remedy to have agents of the United States give appropriate deference to an international treaty that the United States entered into with well over a hundred other countries, including the country from which this defendant is a national.

That having been said, the motion to dismiss -- excuse me, quash the indictment or to suppress the statements on the grounds that the Vienna convention was violated is denied.

The exception of the defendant is noted for the record for each of the reasons ably set forth by counsel both on brief and during the course of oral arguments.

Is there anything further that I need to rule on, counsel, that I haven't ruled on?

MR. RODWAY: No, sir, Your Honor.

THE COURT: Ms. Davoli?

MS. DAVOLI: Nothing further.

THE COURT: I am not going to be your trial Judge on Monday. I have told the Judge who will be conducting the trial on Monday of my rulings so that that

Judge will be fully aware of the circumstances.

The Court stands in recess.

MR. RODWAY: Thank you, Your Honor.

(Whereupon, at approximately 3:35 o'clock p.m., the Defendant was remanded to the custody of the Sheriff and the hearing in the above matter was concluded.)

CERTIFICATE OF COURT REPORTER

I, Christine Swanson, a Certified Verbatim Reporter, do hereby certify that I took the stenographic notes of the foregoing proceedings, and thereafter reduced the same to typewriting; that the foregoing is a true record of said proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were held; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto; nor financially or otherwise interested in the outcome of the action.

Christine G. Swanson

CHRISTINE G. SWANSON
Certified Verbatim Reporter

Citation
3/14/98 WASHPOST B01
3/14/98 Wash. Post B01
1998 WL 2472981

Rank(R)
R 2 OF 6

Database
WP

Mode
Page

The Washington Post
Copyright 1998, The Washington Post Co. All Rights Reserved

Saturday, March 14, 1998

Metro

# Mother's Admission Too Little To Convict; Lack of Proof Cited In Infant's Death

Sylvia Moreno and Brooke A. Masters
Washington Post Staff Writers

When criminal defendants confess, it usually means a slam-dunk victory for the prosecution. But legal experts say that Fairfax prosecutors went into **Elvia Garcia's** murder trial in a particularly vulnerable position because they based their case almost entirely on her early confession that she put prescription painkiller in her baby's bottle.

Then, when the defense came up with a competing version of what happened -- arguing that Garcia had lied during her confession to protect another of her children -- prosecutors had little evidence or testimony to present in response.

During the four-day trial, prosecutors relied on police witnesses and scientific evidence that 11-day-old Ivan Garcia was poisoned by an overdose of tramadol hydrochloride, a prescription analgesic marketed under the name Ultram.

Two assistant public defenders, meanwhile, put on a parade of family members, friends and medical experts who testified that the 20-year-old Mexican immigrant was a devoted mother who could have lied to protect her daughter, 3, because she did not understand the American legal system.

Garcia testified that she believed her daughter, Jessenia, may have unwittingly dropped tramadol in the baby bottle and that she was afraid to tell police for fear that the child would be taken away from her.

Thursday's acquittal prompted outside experts to ask whether prosecutors and police were simply unable to find more evidence to back up their version of events, or whether they stopped too early because Garcia's statement, in their view, solved the case.

"Confessions save a lot of legwork and time for detectives. They often end an investigation," said George Washington University law professor Jonathan Turley. "Then the case will rise or fall on the

Copr. (C) West 1998 No Claim to Orig. U.S. Govt. Works

confession."

And Arlington Commonwealth's Attorney Richard E. Trodden said news reports of the trial opened his eyes to a potential problem. "I learned something," he said. "With just a confession, you should look for other things."

Fairfax Commonwealth's Attorney Robert F. Horan Jr. said there was nothing else to uncover.

"It is one of those offenses where there are only two there: two real people who could ever say anything and one of them, a 2 1/2-year-old, is just not a capable witness," Horan said. "There was really nowhere to go after her confession. If she had said [to police], the child put the pills in the Similac, it would have been over right there. But she didn't say that."

Horan said his office declined to discuss reducing the charge in exchange for a guilty plea. He said he stuck with first-degree murder because Garcia's confession was detailed and convincing.

Defense attorney Joanmarie Davoli said that, during routine trial preparation, her office asked whether prosecutors would be willing to negotiate, but never offered to plead guilty to any charge. "The defendant maintained her innocence to me from the day I met her," Davoli said.

Now that **Elvia Garcia** has been acquitted in her baby's death, will the investigation be reopened?

No, said Lt. Mike Fish, Fairfax County police spokesman. "Our case is closed."

Lawyers not associated with the Garcia case said that, in general, suburban juries are skeptical when defendants change stories after confessing, usually by arguing they had been coerced by police. But, the lawyers said, Garcia's attorneys were able to make a much more appealing case than most.

The defense argued that Jessenia may have put the pills in the bottle and that Garcia's lack of knowledge about the American legal system could have led her to lie to protect her daughter. They also called the dead baby's father, Isaac **Garcia;** his family; **Elvia Garcia's** family; and several friends to testify that she cared deeply about her children and would not hurt them.

"When a jury is wrestling with what is reasonable doubt, and the whole family is pleading for Mom to come home, that's a very emotional situation," said Leesburg defense lawyer Alex Levay.

Copr. (C) West 1998 No Claim to Orig. U.S. Govt. Works

The jury heard clinical neuropsychologist Gloria Morote testify that Garcia fit the profile of a person most likely to give a false confession: docile, passive, gullible and eager to please.

On the stand, Morote, a specialist in cross-cultural relations, said that Garcia has an IQ slightly above mentally retarded, that she has not assimilated into the American culture or way of life, and that she has a dependent-personality disorder.

Yesterday, she said the prosecution's theory that Garcia would kill one child to lessen her burden or to keep her husband from abandoning her ran counter to her background. "Culturally, it does not make sense," Morote said. "Only a gringo could come up with that theory."

Lawyers, including Horan, said it is always tough to convince a jury that a parent killed a child.

"Maybe there was nothing the prosecutors . . . could have done," said Catholic University law professor Clifford S. Fishman. "Jurors don't want to believe that a young mother would kill her young child. That strikes at the heart of who we are."

---- INDEX REFERENCES ----

KEY WORDS: METRO

EDITION: FINAL

Word Count: 818
3/14/98 WASHPOST B01
END OF DOCUMENT

Copr. (C) West 1998 No Claim to Orig. U.S. Govt. Works

A-1132

No. 97-8214

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

ANGEL FRANCISCO BREARD,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

Supreme Court, U.S.
FILED
CLERK

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

# SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
April 14, 1998

Alexander H. Slaughter (VSB#05916)
Counsel of Record
William G. Broaddus (VSB#05284)
Dorothy C. Young (VSB#31155)
McGuire, Woods, Battle & Boothe LLP
One James Center, 901 E. Cary Street
Richmond, VA 23219
(804) 775-1085

Michele J. Brace (VSB No. 36748)
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-8439

Counsel to Angel Francisco Breard

**SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION**

Petitioner, Angel Francisco Breard, by counsel, files this supplemental brief in support of his Application for Stay of Execution. The execution is scheduled for April 14, 1998. Breard will also file a motion for leave to file a petition for writ of habeas corpus in the Court and an application for stay of execution pursuant to it. All three of these filings are prompted by the ruling of the International Court of Justice on April 9, 1998, that the United States keep Breard alive until that court can complete proceedings brought by Paraguay against the United States.

Breard, a citizen of Paraguay born in Argentina, filed his original (and, until today, only) federal habeas corpus petition on August 30, 1996, based in part upon Virginia's violation of the Vienna Convention on Consular Relations in connection with his case. Two weeks after Breard's petition was filed, the Republic of Paraguay, its Ambassador to the United States and its Consul-General filed a federal complaint (denoted hereafter as the Paraguay suit) based upon the same facts as Breard's Vienna Convention claim, seeking declaratory and injunctive relief against several officials of the Commonwealth of Virginia to vindicate rights conferred upon Paraguay and the Consul-General by the Vienna Convention. After the Fourth Circuit Court of Appeals affirmed the District Court's dismissal of both cases,[1] the Circuit Court for Arlington County set April 14, 1998, as the date for Breard's execution. A copy of this order is attached as Exhibit A.

The plaintiffs in the Paraguay suit filed a Petition for Certiorari in the Court on February 24, 1998. Republic of Paraguay v. Gilmore, No. 97-1390. On March 11, 1998, Breard filed a Petition for a Writ of Certiorari in the Court. Breard v. Greene, No. 97-8214. On March 22, 1998, the Paraguay plaintiffs filed an Application for Stay of or Injunction Against Execution pending Disposition of Petition for Certiorari. On March 30, 1998, Breard filed an Application

---

[1]Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998); Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998).

for Stay of Execution based upon his Petition for Certiorari. Both Petitions for Certiorari and Applications for Stay are pending in the Court. The Court, by order dated April 8, 1998, invited the Solicitor General to present the views of the United States on both the Breard and Paraguay cases by 5:00 p.m. on April 13, 1998.

On April 3, 1998, pursuant to Article 1 of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 590 U.N.T.S., 261, the Republic of Paraguay filed in the International Court of Justice (the "ICJ") an Application and a Request for Interim Measures of Protection in a case concerning the proceedings brought against Angel Francisco Breard: Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America). Copies of those documents are attached as Ex. B. The interim measures of protection sought included: (1) that the Government of the United States take the measures necessary to ensure that Breard not be executed pending the disposition of the case in the ICJ, and (2) that the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision the ICJ may render on the merits of the case. After hearing oral argument on April 7, 1998, the ICJ entered a Order joined in by the entire 15 member court, on April 9, 1998, attached as Ex. C, indicating that:

> The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order.

In a concurring declaration, attached as Ex. D, the ICJ's President Stephen M. Schwebel, of the United States, stated:

> It is of obvious importance to the maintenance and development of a rule of law among states that the obligations imposed by treaties

> be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

Breard respectfully presents this development to the Court as an additional reason to stay his execution. First, it will allow the Court adequate time to consider the ICJ's ruling and the implications to the United States of complying with its request, on the one hand, or disregarding it on the other. To do the latter, that is, to refuse to honor an order of a unanimous World Court may have serious implications for the United States and particularly its "peripatetic" citizens. Additional time would also allow the political processes to work themselves out. The Executive Branch apparently does not have the authority to carry out the ICJ's order directly. And according to press reports the Governor of Virginia is relying on the courts -- rather than his own discretion or requests of the Executive Branch -- to tell him what to do about the ICJ's order.[2]

A stay of execution with respect to a pending petition for certiorari should be granted if it is reasonably probable that four members of this Court would consider any of the underlying issues sufficiently meritorious for a grant of *certiorari*, there is a significant possibility that the decision of the Court of Appeals will be reversed, and irreparable harm is likely to result if the decision is not stayed. Barefoot v. Estelle, 463 U.S. 880, 895 (1983). Here, however, the Court is faced, perhaps for the first time, with the interplay of the ICJ's ruling (and role) and the Court's

---

[2] *See* Richmond Times Dispatch (Frank Green) April 10, 1998, p. A12 (Ex. E):

> "Asked [Governor] Gilmore's reaction to the international court's ruling, his spokesman, Mark A. Miner, said yesterday that 'the governor will continue to follow the U.S. courts and the United States Supreme Court.'"

Petitions for Clemency and a Reprieve (the latter grounded on the ICJ's ruling) have, of course, been filed with the Governor nonetheless.

undisputed supremacy in domestic judicial matters. For instance, the Court may consider that given the preeminence of the United States and its emphasis on the rule of law, it might reject worries about violated sovereignty and defer its ruling until the ICJ renders a final adjudication.

For instance, one of the issues submitted by Paraguay to the ICJ is a request that the ICJ adjudge and declare:

> that the United States is under an international obligation not to apply the doctrine of "procedural default" or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under article 36 of the Vienna Convention.

Ex. B at 9, IV.25(3).

The ICJ's views on this matter might be useful to the Court in considering Breard's petition for certiorari.

If the ICJ determines that Paraguay's Vienna Convention rights were violated and that this violation should be remedied by a new trial, and in particular if it decides that the United States is under an international obligation not to apply procedural default rules in a case such as this, it is reasonably probable that four members of the Court will consider the underlying issues sufficiently meritorious for a grant of *certiorari*, and there is a significant possibility that the decision of the Court of Appeals will be reversed. The final factor for the Court to consider in order to grant a stay of execution -- that irreparable harm is likely to result if the decision is not stayed -- is indisputable. Breard will die on April 14, 1998, unless his execution is stayed.

As Judge Butzner of the Court of Appeals noted in his concurring opinion in this case,[3] the Convention affects Americans who travel abroad each year and who might be taken into custody by officials of another country. If America's domestic courts fail to provide any legal

---

[3]Breard v. Pruett, 134 F.3d at 622.

remedy when the ICJ has determined that a remedy should be provided to an alien who was convicted in this country and given what some nations deem a "barbaric" sentence of death without the knowledge or intervention of his consulate, the United States is in no position to protest if another country's procedural rules are used to the same effect against Americans detained abroad.

## CONCLUSION

For all these reasons, the Court should stay Breard's execution pending disposition of his Petition for a Writ of Certiorari in this case or until further Order of the Court

Respectfully submitted,

ANGEL FRANCISCO BREARD

By Counsel

Alexander H. Slaughter (VSB#05916)
William G. Broaddus (VSB#05284)
Dorothy C. Young (VSB#31155)
MCGUIRE, WOODS, BATTLE & BOOTHE LLP
One James Center, 901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000

Michele J. Brace (VSB# 36748)
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-8439

## CERTIFICATE

I certify that a copy of the foregoing was faxed and hand-delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, and faxed and sent by Federal Express overnight delivery service for Saturday delivery to Seth P. Waxman, Esquire, Solicitor General of the United States, Office of the Solicitor General, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 on April 10, 1998.

Alexander H. Slaughter

No. 97-8214
A-732

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

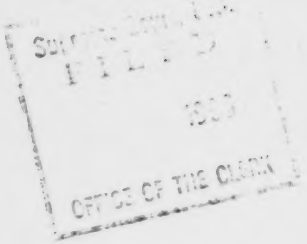
ANGEL FRANCISCO BREARD,

Petitioner

v.

FRED W. GREENE, WARDEN,

Respondent




## WARDEN'S SUPPLEMENTAL OPPOSITION

On April 9, 1998, the International Court of Justice (ICJ) at the Hague "indicated" what are called "provisional measures," stating that the United States "should take all measures at its disposal to ensure" that the execution of Virginia death row prisoner Angel Breard, now scheduled for April 14, 1998, is not carried out pending final judgment by the ICJ in Paraguay v. United States. Breard now has brought the ICJ's "indication" to the attention of this Court and argued that he is thereby entitled to a stay of his execution.

Breard obviously is ***not*** contending that the ICJ's "provisional measures" in and of themselves constitute a stay of his execution. After all, if the ICJ supposedly had the authority to stay Breard's execution and in fact had done so, there would no execution date left for Breard to ask this Court to stay. Not even Breard, however, is rash enough to invest the ICJ with such

APR. -13' 98(MON) 08:49 TEL:0 P.002

omnipotence, as is evident from the fact that, despite the ICJ's action, he has asked this Court for a stay.

Breard merely is asserting that the ICJ's "provisional measures" provide an additional basis upon which this Court should grant his stay motion. The question, therefore, that this Court must ask is: "For what event or occurrence is the Court being asked to stay Breard's execution?" If the Court is being asked to stay a State prisoner's execution during the indeterminate number of years that Paraguay's action against the United States is likely to remain pending before the ICJ,[1] in the hope that Paraguay will prevail and that the ICJ's judgment somehow will affect Breard's state court conviction or sentence, then the Court clearly must deny the request because neither this Court, nor any other federal court, has the authority to stay a State prisoner's execution while he or someone else litigates a case in a foreign court. Once direct appeal has been completed, a federal court's sole authority to stay a State prisoner's execution is pursuant to 28 U.S.C. § 2251, in the context of ongoing federal habeas corpus proceedings.[2] See also Gomez v. United States District

[1] Virginia has been informed by the State Department that the typical ICJ action remains pending for more than five years prior to final decision. The fact that the ICJ has initiated what it regards as a "expedited" briefing schedule should be of no solace to the Court, and certainly is of no solace to Virginia. Requiring Paraguay to file its brief in June and the United States to file its brief in September hardly coincides with Virginia's view of "expedited." In any event, the ICJ has imposed no deadline on itself for decision and therefore a stay pending final judgment by the ICJ would be not only unauthorized, but intolerable. It simply makes no sense, moreover, to stay a State prisoner's execution pending the outcome of an international proceeding which, in the end, can have no binding effect on the validity of his conviction or sentence.

[2] On direct appeal, this Court may stay a state court criminal judgment pending disposition of a certiorari petition. See 28 U.S.C. § 2101(f).

Court, 503 U.S. 653 (1992) (any request to stay a State prisoner's execution after he has litigated one federal habeas petition must satisfy the stringent rules governing successive petitions).

Even if this Court had the raw authority to grant a stay for such a highly questionable reason, the Court clearly should not take the extraordinary and unprecedented step of granting a stay of a State prisoner's execution for as long as an international tribunal – over which this Court has no supervisory authority – may choose to take in reaching a decision that ultimately can have no binding effect on the prisoner's conviction or sentence. ***Indeed, it would be difficult to overestimate the harm that such a decision would cause to the interests of federalism, comity and finality that this Court has sought to foster in cases dealing with State prisoners***. This is particularly true where, as here, the prisoner is asking for relief on the basis of ***a defaulted claim that he admits he never raised in state court.***

Finally, if Breard is asking the Court (as he did originally) to stay his execution merely because of the pendency of his certiorari petition, the ICJ's action simply is irrelevant. Nothing the ICJ has done, or may do, can affect the issue of whether Breard is entitled to a stay of execution from a federal court on the basis of a defaulted claim. (See Warden's previously-filed opposition to Breard's certiorari petition and stay motion). Breard's stay motion must rise or fall on its own merits, irrespective of the ICJ's "provisional measures." ***Indeed, Breard clearly has no standing to ask a federal court to enforce a judgment by the ICJ***. See Committee of United States Citizens v.



APR. -13. 98(MON) 08:49 TEL:0 P. 003

Reagan, 859 F.2d 929, 934 (D.C. Cir. 1988) ("Neither individuals nor organizations have a cause of action in an American court to enforce ICJ judgments").[3]

## *CONCLUSION*

For all the foregoing reasons and those set forth in the respondent's previously-filed opposition to Breard's stay motion, this Court should deny Breard's request to stay his execution.

Respectfully submitted,

FRED W. GREENE, WARDEN

By: _____
Counsel

[3] The Court should be aware that the United States vigorously has opposed Paraguay's action in the ICJ, as well as Paraguay's request for "provisional measures." The United States argued forcefully that the ICJ had no jurisdiction to issue the "provisional measures" or to grant Paraguay's request to void Breard's capital murder conviction and death sentence. (See Attachment 2 to Warden's opposition to Breard's original jurisdiction habeas petition and stay request). The United States also has informed Paraguay that the alleged treaty violation in Breard's case had no substantial effect on his conviction or sentence. (See Attachment 3 to Warden's opposition to Breard's original jurisdiction habeas petition and stay request). Under these circumstances, the ICJ's "provisional measures" clearly constitute a non-justiciable "political question" and, while they may be dealt with by the Executive Branch of the United States Government, they certainly cannot serve as a basis for a federal court's stay of a State prisoner's execution. See generally Head Money Cases, 112 U.S. 580, 598 (1884) (a treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations...[but] with all this the judicial courts have nothing to do and can give no redress"); Foster v. Neilson, 27 U.S. 253, 314 (1829) ("when either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department").

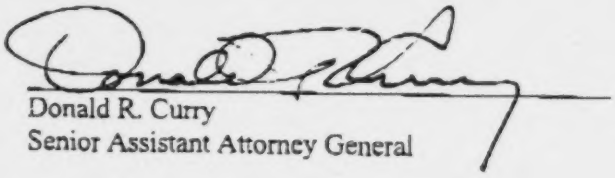


APR. -13. 98 (MON) 08:50 TEL:0 P. 004

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of April, 1998, a copy of the foregoing Supplemental Opposition was faxed to Alexander H. Slaughter, McGuire, Woods, Battle & Boothe, One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030, counsel for petitioner.



Donald R. Curry
Senior Assistant Attorney General



APR. -13' 98(MON) 08:50 TEL:0 P.005

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

REPUBLIC OF PARAGUAY, ET AL., PETITIONERS

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, ET AL.

ANGEL FRANCISCO BREARD, PETITIONER

v.

FRED W. GREENE, WARDEN

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

SETH P. WAXMAN
Solicitor General
Counsel of Record

FRANK W. HUNGER
Assistant Attorney General

JOHN C. KEENEY
Acting Assistant Attorney General

EDWIN S. KNEEDLER
MICHAEL R. DREEBEN
Deputy Solicitors General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

ROBERT J. ERICKSON
MARK B. STERN
SEAN CONNELLY
H. THOMAS BYRON, III
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID R. ANDREWS
Legal Adviser
Department of State
Washington, D.C.

## QUESTIONS PRESENTED

The United States will address the following questions:

1. In No. 97-1390, whether the Vienna Convention on Consular Relations grants a foreign country or its representatives a judicially enforceable remedy of vacatur of a criminal conviction and sentence of one of its nationals, based on a past violation of Article 36(1)(b) of the Convention, requiring notification to an arrested foreign national of his right to have his country's consular representatives informed of his arrest.

2. In No. 97-1390, whether the Treaty of Friendship, Commerce, and Navigation of 1859 between the United States and Paraguayan requires United States authorities to inform Paraguayan consular officials whenever a Paraguayan national is arrested in this country; and if so, whether that Treaty grants Paraguay or its representatives a judicially enforceable remedy of vacatur of a criminal conviction and sentence of one of its nationals based on a past violation of the Treaty.

3. In No. 97-8214, whether petitioner may raise, in his instant habeas corpus petition, a claim that his conviction and sentence must be set aside because of a past violation of Article 36(1)(b) of the Vienna Convention.

4. Whether, in either No. 97-1390 or No. 97-8214, petitioners are entitled to a stay of execution.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

---

No. 97-1390 (A-738)

REPUBLIC OF PARAGUAY, ET AL., PETITIONERS

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, ET AL.

---

No. 97-8214 (A-732)

ANGEL FRANCISCO BREARD, PETITIONER

v.

FRED W. GREENE, WARDEN

---

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

## INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States in these cases.

## STATEMENT

1. These cases principally involve questions concerning the application in domestic courts of the United States of Article 36 of the Vienna Convention on Consular Relations, April

24, 1963, 21 U.S.T. 77, 100-101. Petitioners also seek to implicate Article XII of the Treaty of Friendship, Commerce, and Navigation (FCN) between the United States and the Republic of Paraguay, Feb. 4, 1859, 12 Stat. 1092.

Article 36(1)(b) of the Vienna Convention, 21 U.S.T. at 100-101, provides:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State: * * *
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forward by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph[.] * * *

In bilateral consular conventions with several nations, the United States has agreed to the effect that "[a] consular officer [of the sending state] shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained within his district." Consular Convention, June 6, 1951, United States-United Kingdom, 3 U.S.T. 3426; see also 97-1390 Pet. App. A38-A39 (similar; consular conventions with USSR and China). Although Paraguay is not party to any such bilateral agreement with the United States, it contends that its consular officers are also entitled to mandatory notification of a Paraguayan national's arrest in the United States pursuant to

Article XII of the FCN Treaty, which provides that "[t]he diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever."

2. On August 17, 1992, Petitioner Breard was arrested by Arlington County, Virginia, police for attempted rape. Further investigation led the police to connect Breard with the earlier murder and attempted rape of Ruth Dickie in February 1992. Although Breard is a citizen and national of Paraguay, neither Arlington nor Virginia authorities advised him, at any point before his trial, of any right to have the Paraguayan consulate informed of his arrest. Nor did Arlington or Virginia authorities inform the Paraguayan consulate that Breard had been arrested. 97-1390 Pet. App. A3.

After a jury trial in the Circuit Court for Arlington County, Breard was convicted of capital murder and attempted rape and was sentenced to death. The conviction and sentence were affirmed by the Virginia Supreme Court on direct review, and this Court denied certiorari in 1994. 97-1390 Pet. App. A3-A4. Breard also pursued collateral review of his conviction and sentence in the Virginia state courts, unsuccessfully; the Virginia Supreme Court denied his petition for leave to appeal in January 1996. Id. at A4. At no point in his trial, his initial appeal, or his state collateral proceedings did Breard raise a claim that state authorities had violated the Vienna Convention

by failing to inform him of a right to have the consulate informed of his arrest. Ibid.

3. At some point after the Virginia Supreme Court's denial of review of Breard's collateral challenge to his conviction, diplomatic and consular representatives of the Republic of Paraguay became aware of Breard's conviction and sentence and sought to confer with Breard, as provided for by the Vienna Convention. Once that request was made, Virginia authorities agreed, and since that time Paraguayan officials have been granted free access to Breard, in conformity with the Convention. 97-1390 Pet. App. A4.

4. In April 1996, Breard filed a petition for a writ of habeas corpus in federal district court, contending for the first time that his conviction and sentence were invalid because of Virginia's failure to comply with the Vienna Convention. The district court held that federal review of that claim on habeas corpus was barred by Breard's procedural default in failing to raise the claim in state court. 97-8124 Pet. App. 23. The court of appeals agreed. 97-1390 Pet. App. A27-A30. The court further concluded that Breard had not shown cause that might excuse his procedural default, and in particular, that Breard had not shown that "the factual basis for his Vienna Convention claim was unavailable" at the time of his trial. Id. at A30. The court also found no potential "miscarriage of justice" to excuse the procedural default, noting that no reasonable juror could

have found that Breard was actually innocent of the crime or not eligible for the death penalty. Id. at A30-A31.

5. In September 1996, the Republic of Paraguay, the Ambassador of Paraguay, and the Paraguayan Consul General filed a complaint in federal district court, seeking a declaration that Virginia authorities had violated the Vienna Convention and the FCN Treaty with Paraguay, a declaration that Breard's conviction was void because of those alleged violations, and an injunction requiring vacatur of Breard's conviction. 97-1390 Pet. App. A55. The plaintiffs asserted two causes of actions based directly on the Convention and the FCN Treaty; the Consul General also asserted a cause of action under 42 U.S.C. 1983, based on the alleged deprivation of the Consul General's asserted right (under the FCN Treaty) to be informed of Breard's arrest and his asserted right (under the Vienna Convention) to have Breard informed of his own right to have the consular post informed of his arrest. 97-1390 Pet. App. A52-A54.

The district court dismissed the complaint for lack of subject-matter jurisdiction, based in large part on its conclusion that the action was barred by the Eleventh Amendment. The district court noted that the complaint did not allege that the state defendants continue to refuse to allow consular officials to give Breard assistance; "[n]ow that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties." 97-1390 Pet. App. A17-A18.

The court of appeals likewise held that Paraguay's action was barred by the Eleventh Amendment. The court concluded, centrally, that the action did not fall within the exception to the States' Eleventh Amendment immunity from suit for injunctions against continuing violations of federal law, recognized in Ex parte Young, 209 U.S. 123 (1908), because "the violation [of the treaties] alleged here is not an ongoing one * * * [and] the essential relief sought is not prospective." 97-1390 Pet. App. A8-A9. The court agreed with respondents that "there is no ongoing violation of Paraguay's rights * * * because Paraguay is presently on notice of Breard's situation and [Virginia] is not now preventing Paraguay from giving whatever aid and counsel to Breard it desires." Id. at A9. The court emphasized that "the actual violation alleged is a past event that is not itself continuing," ibid., and it distinguished various cases relied on by Paraguay as involving "examples of presently experienced harmful consequences of past conduct, hence of ongoing violations of federally protected constitutional rights," id. at A9-A10. By contrast, the court concluded, the relief sought in this case "is quintessentially retrospective: the voiding of a final state conviction and sentence. * * * [I]ts effect would be to undo accomplished state action and not to provide prospective relief against the continuation of the past violation." Id. at A11.

6. The Department of State is the agency of the federal government with lead responsibility for issues arising under the Vienna Convention, including Article 36. The Department

historically has issued periodic guidance to law enforcement officials about the requirements of consular access and notification, to further compliance with Article 36 by such officials. In addition, the State Department works with foreign consular officials and federal, state, and local law enforcement officials in the United States to address issues of non-compliance when they arise. In January 1998, the State Department issued a new publication, Consular Notification and Access, which provides comprehensive guidance on consular notification and access requirements, and in February 1998 it began distributing to law enforcement officials a pocket card setting forth the basic requirements for notification in cases of arrest and detention of foreign nationals.[1]

Some time after April 18, 1996, the United States Department of State received official notice of Breard's case through a diplomatic note of that date from the Embassy of Paraguay. That diplomatic note did not allege a breach of the Vienna Convention, but it did request the State Department's assistance in facilitating efforts to obtain information about the case from Virginia and in arranging a visit at the place of Breard's detention. Such assistance was provided. On June 4, 1996, the Department forwarded to the Governor of Virginia appeals for clemency that were received by the United States Embassy in

---

[1] That brochure is the State Department's most definitive statement on how consular notification and access obligations should be honored by law enforcement officials. A copy of the brochure has been lodged with the Clerk.

Paraguay. On October 15, 1996, State Department representatives discussed the case at a meeting with representatives of Paraguay and its counsel. On December 10, 1996, the Assistant Secretary of State received a request from the Paraguayan Ambassador for assistance in obtaining a new trial for Breard.

Because of the State Department's responsibilities relating to U.S. compliance with Article 36 of the Vienna Convention, and because the Department considered it important to address Paraguay's concerns seriously in diplomatic channels, the State Department decided to undertake an investigation of the case. The Department reviewed the critical portions of the trial transcript, including Breard's testimony, and an affidavit from Breard's defense attorneys concerning their efforts on his behalf. That review persuaded the Department, critically, that Virginia authorities' failure to comply with Article 36 of the Convention prior to trial did not affect the outcome of Breard's trial or sentencing proceeding. In particular, the Department concluded that Breard had had the kinds of assistance that consular officers generally seek to ensure. The State Department came to the following specific conclusions, among others:

Breard had almost immediate and thereafter continuing contact with his family, who were involved in his defense;

Breard could not have been ignorant of American culture, as he had lived in this country since 1986 and had been married briefly to a United States citizen;

Breard had a good command of English and therefore would not have needed consular assistance in interpretation;

Breard was ably represented by criminal defense attorneys experienced in death penalty litigation, who worked closely with his family, some of whom traveled from Paraguay to assist in the defense;

Breard decided to plead not guilty and to testify at his trial contrary to the competent advice of his attorneys, who were far better able to explain the U.S. legal system to him than any consular officer would have been;

Breard's mother, who was also Paraguayan, understood that Breard's decision to plead not guilty and to testify was a strategic error and advised him not to do what he did, and so it was implausible that cultural misunderstandings accounted for his decision;

The evidence at trial demonstrated that Breard unquestionably committed the crime, and that the jury and judge could easily have imposed the death penalty even if Breard had not testified, given ample evidence that the murder was "aggravated" within the meaning of Virginia law; and

Breard had the full protection of the criminal justice system.

See App. A, infra, 33-38 (record of April 7, 1998, proceeding before International Court of Justice; United States' submission).

On July 7, 1997, after the State Department's review of the Breard case was completed, the Department reported its conclusions, including many of the above-mentioned facts, to the Paraguayan Ambassador. The Department expressed "deep regret" that Breard apparently had not been advised of his right to have consular authorities informed of his arrest and detention, as required by the Convention. The Department also advised, however, that it had found no basis for concluding that consular assistance would have altered the outcome of Breard's trial. The Department nevertheless invited Paraguay to call additional relevant information to its attention. App. A, infra, at 38; App. B, infra (correspondence between Paraguayan Ambassador and State Department). The Embassy of Paraguay neither responded officially to the Department's letter nor attempted to address the Department's analysis or conclusions.

The Department has intensified its efforts to ensure that federal, state, and local law officials in the United States are aware of and comply with the consular notification and access requirements of the Vienna Convention. The Department has issued new comprehensive guidance on the subject, which has been personally provided by the Secretary of State to the Governor of every State of the United States (a copy of that guidance has been lodged with the Clerk). This guidance and a pocket-sized reference card for law enforcement officers to carry on the street have also provided to the Attorney General of every State. The State and Justice Departments have also begun to conduct

briefings on the requirements of consular notification and access for prosecutors and law enforcement officials, focusing initially on areas with high concentrations of foreign nationals. App. A, infra, 38-39.

7. On March 30, 1998, the Government of Paraguay officially notified the United States that, unless the United States could stay Breard's execution and engage in consultations, it would file suit in the International Court of Justice (ICJ) on April 3, seeking an order that the execution be stayed. We are informed that the Department of State agreed to consultations and made a request through counsel to the Governor of Virginia, on behalf of the Secretary of State, requesting that Virginia stay Breard's execution. After consultation with the Governor, counsel for the Governor replied that Virginia was not at that time prepared to grant the Department's request, in part because of the pendency of these cases before this Court. We are informed that the State Department advised the Government of Paraguay of the Governor's response on the following morning.

On April 3, 1998, Paraguay filed an application with the International Court of Justice (ICJ), requesting a declaration from that court that the United States had violated Article 36 of the Vienna Convention by failing to inform Breard of his right to have the Paraguayan Consulate notified of his arrest, and an order directing the reestablishment of the "status quo" before that violation, including vacatur of Breard's conviction. See 97-8214 Supplemental Brief in Support of Application for a Stay

of Execution, Exh. B. Paraguay requested the ICJ to indicate provisional measures pending the outcome of the case. Ibid. On April 7, 1998, the ICJ heard oral arguments on Paraguay's request for the indication of provisional measures. On April 9, 1998, the ICJ issued an order, indicating that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." Id. Exh. C, ¶ 41 (ICJ order).

On April 9, 1998, the Legal Adviser to the Department of State wrote to the Governor of Virginia, bringing the order of the ICJ to his attention. The Legal Adviser requested that the Governor give consideration to the ICJ's indication of provisional measures. App. C, infra (letter from Legal Adviser to Governor). The Secretary of State is also requesting that the Governor of Virginia stay Breard's execution, in light of the ICJ's order indicating provisional measures. App. F, infra.

DISCUSSION

The United States takes very seriously both the obligations embodied in the Vienna Convention on Consular Relations and instances of violations of those obligations. In this case, the Executive Branch has conceded that the Vienna Convention was violated insofar as it required that Breard be notified that he could have the assistance of a consular officer. But the Executive Branch has also concluded that there was no affirmative interference in Breard's ability to consult with Paraguayan consular officials (his family or his attorney could have done so

at any time) and that there is no basis for concluding that the assistance of a consular officer would have changed the outcome of the criminal proceedings. It has ascertained that the essential kinds of assistance that consular notification is intended to ensure were, in fact, provided to Breard notwithstanding the failure of notification. It has also determined that the remedy Paraguay seeks is not supported by the Convention's text, its negotiation history, or the subsequent practice of state parties. In view of these considerations and the fact that a consular officer has no obligation to provide any particular level of services, the Executive Branch has concluded that Paraguay's claim as to the relevance of consular notification in Breard's case are speculative and unpersuasive, and that there is in any event no basis for requiring the undoing of the lawfully imposed sentence of the courts of Virginia. The State Department has accorded Paraguay the traditional remedy among nations for failures of consular notification: it has investigated the facts, determined that there was a breach, formally apologized on behalf of the United States, and undertaken to improve future compliance.[2]

Moreover, notwithstanding the importance of the Vienna Convention, we also believe that the Convention does not provide

---

[2] The State Department is aware of no State of the United States that takes the official position that it is not required to honor the obligations of Article 36. Suggestions to the contrary by Paraguay and Breard have been considered by the Department and found to be unwarranted. The Department of State would address any evidence of deliberate noncompliance brought to its attention.

a judicial cause of action, at the behest of either a foreign national or his sending state, to have a criminal conviction or sentence vacated, either on direct appeal or on a collateral proceeding. That construction of Article 36 of the Convention by the State Department, which is responsible for its implementation, is "entitled to great weight." United States v. Stuart, 489 U.S. 353, 369 (1989). There is no indication in the text or negotiating history of the Convention, or in its implementation by contracting states, that a violation of Article 36 could vitiate an otherwise valid conviction, and such a result would be inconsistent with the inherently discretionary nature of consular relations. Furthermore, this Court has never addressed whether any remedy should be available in a criminal case for a violation of Article 36, and it would be inappropriate for this Court to decide that issue for the first time in the context of a collateral habeas corpus proceeding, especially where the issue was not raised at trial or the initial appeal. This Court should therefore deny the certiorari petitions as well as petitioners' related motions for relief under the Court's original jurisdiction.

## I. NEITHER PARAGUAY NOR ITS OFFICIAL REPRESENTATIVES HAVE A CAUSE OF ACTION THAT WOULD AFFORD A JUDICIAL REMEDY IN DOMESTIC COURTS OF VACATUR OF A CRIMINAL CONVICTION OF A PARAGUAYAN NATIONAL

### A. Paraguay May Not Proceed Under the Vienna Convention

1. a. Although the court of appeals disposed of Paraguay's action on Eleventh Amendment grounds, the United States' principal concern here is with the Convention itself. Specifically, the important question for the United States is whether the Convention provides a judicial cause of action or remedy in domestic courts, at the behest of a sending state or its representatives, to obtain the vacatur of a conviction on the basis of the past failure of authorities to inform an arrested national of the sending state of his right to have his consular representative informed of his arrest. That question must be distinguished from the entirely different question whether a sending state such as Paraguay (or an arrested foreign national) might have recourse to the courts for an order directing cessation of an ongoing refusal of authorities to allow consular notification or access, as guaranteed by the Convention.[3] Thus, while we do not necessarily endorse the court of appeals' distinction between "past" and "ongoing" violations of the Convention for Eleventh Amendment purposes in this setting, we do

---

[3] This case also does not raise any questions concerning the ability of the United States to sue in order to enforce compliance with the Vienna Convention. See United States v. Arlington County, 669 F.2d 925 (4th Cir.), cert. denied, 459 U.S. 801 (1982).

agree that Paraguay and its representatives were properly denied the judicial relief that they seek.

In answering that question with respect to Paraguay's suit, we start from the presumption, articulated by this Court in The Head Money Cases, 112 U.S. 580 (1884), that "[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provision on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress. * * * It is obvious that with all this the judicial courts have nothing to do and can give no redress." Id. at 598; see also Charlton v. Kelly, 229 U.S. 447, 474 (1913); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided."). This Court has consistently stated that the power to determine whether the United States has, or has not, acted in accordance with a treaty's obligations to a foreign nation "ha[s] not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws." Whitney v. Robertson, 124 U.S. 190, 194-195 (1888).

These considerations are the appropriate ones in the circumstances of this case, where the United States has addressed

Paraguay's concerns in diplomatic channels. It is not unusual for a treaty to "only set forth substantive rules of conduct * * * [and] not create private rights of action * * * [that would permit suit] in United States courts." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989). While in some circumstances parties to a treaty may intend that there be judicial enforcement of its provisions, such judicial remedies are generally reserved for treaties "which are capable of enforcement as between private parties in the courts of the country," Head Money Cases, 112 U.S. at 598, and not when one nation challenges the governmental conduct of another. Thus, for example, treaties "which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance" may be invoked by aliens in domestic courts as controlling law. Ibid.

This case, however, involves a claim by a foreign government that a State of the United States should be prevented by domestic courts from carrying out its sovereign authority to enforce the sentencing judgment of its criminal courts, notwithstanding the view of the Executive Branch that such a remedy is unwarranted. Such a claim is extraordinary, and could be recognized only if there were clear evidence that the parties to the Vienna Convention had intended such a judicial remedy to be available.[4]

---

[4] It is important to distinguish the question whether the Vienna Convention creates a judicial remedy for Paraguay from the question whether the Convention is "self-executing." The United States agrees that the Vienna Convention is self-executing, in

(continued...)

b. (i) In construing a treaty, as in construing a statute, the Court looks first to its terms to determine its content. United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992). Nothing in the text of the Convention provides that past violations of Article 36 are to be remedied through judicial actions by sending states or their nationals to vacate criminal convictions. Article 36(1)(b) does state that arresting authorities are to inform an arrested foreign national of "his rights" to have a consular post informed of his arrest or detention, but this case does not involve an attempt to enforce those rights presently; neither Paraguay nor Breard is seeking to

---

[4](...continued)
the sense that it can be implemented by government officials without implementing legislation. That issue is distinct from the question whether the Convention creates enforceable rights that may be raised and adjudicated in a particular judicial setting. See, e.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298-1299 (3d Cir. 1979); Dreyfus v. Von Finck, 534 F.2d 24, 29-30; United States v. Bent-Santana, 774 F.2d 1545, 1550 (11th Cir. 1985). Further, in this case, there is an important distinction between the availability of a cause of action to obtain consular notification (or to prevent ongoing interference with the right to obtain such notification) and the existence a cause of action to vacate a criminal conviction and sentence based on a prior failure of consular notification. See generally Restatement (Third) of the Foreign Relations Law of the United States § 111, cmt. h ("Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."); id. § 907, cmt. a ("International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies."); C. Vasquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695, 719-722 (1995) (right of action question "is analytically distinct from the 'self-execution' concept").

have the Paraguayan consulate informed of his arrest.[3] Similarly, although Article 36(1)(c) states that consular officers "shall have the right to visit a national of the sending State who is in prison," no current interference with that right is at issue here, for Virginia has afforded Paraguayan officials access to Breard. Article 36(2) further states: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." As we have just explained, however, enforcement of "the rights accorded under this Article" (Article 36) is not the object of this litigation.

(ii) The negotiating history of the Convention also gives no indication that the contracting parties intended that the Convention itself would mandate that a failure of consular notification would affect the validity of a criminal conviction or would permit a sending state to obtain an injunction against the execution of a criminal sentence in a receiving state. Cf. Alvarez-Machain, 504 U.S. at 665 (considering negotiating history of U.S.-Mexico extradition treaty). The initial draft of Article 36 was based on a proposal of the International Law Commission,

---

[3] It is also noteworthy that the parties to the Convention expressly "realiz[ed] that the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." 21 U.S.T. at 79.

which would have required that countries automatically notify the relevant consulate whenever an alien was arrested. Several delegations (including the United States delegation) opposed that requirement, emphasizing that mandatory notification in all cases would impose an obligation beyond the capacity of many receiving countries to fulfill, given the large number of aliens residing in or visiting those countries, and that mandatory notification might be contrary to the wishes of some arrested persons, who might not want their consular post to be informed of their arrest. App. D, infra (Volume I, Official Records, United Nations Conference on Consular Relations, Vienna, 4 March--22 April 1963) at 336-337. Other delegates, however, felt that, to protect the consular function, consular authorities should always be informed of their nationals' arrests, without the need for an express invocation of the right to such notification by the arrested national. Originally, proposals to make consular notification dependent on a request by the arrested person were rejected. Id. at 342. A month later, however, the Conference reconsidered Article 36, and accepted both a 17-power amendment to make notification of the consular post dependent on the request of the arrested individual, and an amendment submitted by the United Kingdom requiring that an arrested alien be informed of his right to have consular notification made. Id. at 82-87.

The Vienna Conference was well aware that aliens might frequently find themselves subject to other countries' criminal processes, especially in countries "which had large numbers of

resident aliens or which received many tourists and visitors." App. D, infra, at 82, ¶ 62 (Egyptian delegate). In light of the potential burden of consular notification on receiving countries, the compromise eventually adopted was intended to ensure "that the authorities of the receiving State would not be blamed if, owing to pressure of work or to other circumstances, there was a failure to report the arrest of a national of the sending State." Ibid. Given the concerns expressed about burdens on receiving countries, it is difficult to believe that the Conference would have accepted a proposal that would have led to invalidation of criminal convictions. And, in fact, no such proposal was advanced, much less adopted.[4]

(iii) The practice of other contracting states in implementing the Convention also gives no indication that a violation of Article 36 may be remedied through judicial vacatur of a conviction. Cf. Alvarez-Machain, 504 U.S. at 665. Throughout the two-year period in which the Department of State and the Embassy of Paraguay have been discussing Breard's case, Paraguay has failed to identify a single country that would grant the remedy that Paraguay seeks from the United States courts. Moreover, when Breard's case came to the attention of the State Department, the Department made inquiries to all United States

---

[4] Indeed, some delegates objected even to the adopted compromise on the ground that "[t]he convention was concerned with consular privileges and immunities and not with national laws," and that "[n]o receiving State could admit interference in its internal judicial affairs." App. D, infra, at 84, ¶ 81 (Romanian delegate).

embassies worldwide, and through them, to foreign countries, as to the availability of remedies for the failure of governments to comply with Article 36. Although the results of that survey remain incomplete, the survey also did not reveal a single instance in which a foreign country had provided a status quo ante remedy of vacating a criminal conviction for a failure of consular notification (at the behest of either the arrested foreign national or his government). See App. A, infra, at 32. Our legal research has revealed only one case abroad in which that claim was even considered, and it was rejected on the grounds that, under the Convention, consular authorities had only a "complementary and subsidiary" power to assist the accused in obtaining legal counsel, and that the accused in that case had legal counsel (which is also true of Breard). See App. E, infra (excerpt and discussion of Re Yater, 77 I.L.R. 541-542 (Italy, Court of Cassation 1973)).

(iv) Finally, the absence of any judicially enforceable remedy of vacatur is not surprising given the nature of the interests at stake. The Convention does not make consular assistance essential to the host country's criminal justice system, and there is no reason why criminal proceedings cannot continue without the presence of a consular officer. Consular officers do not act as attorneys for their nationals in the United States, nor do American consular officers act as attorneys for United States citizens in foreign courts. Moreover, consular officers have broad discretion to determine how they will

discharge their function, once they are informed of a national's arrest; they may do nothing at all, or they may simply see to it that the arrested national has competent counsel (which Breard had) and contact with his family (which Breard also had). It would be wrong automatically to vacate a criminal conviction based on a lack of consular notification, given that such notification might have resulted in no essential (or even significant) consular assistance at all. And there is no workable way to determine whether consular notification would have made a difference at a defendant's trial, given the inviolability of consular archives and the privileges and immunities of consular officers. Furthermore, compliance with Article 36 varies widely worldwide, and violations of the obligation to inform arrested nationals of their right to consular notification are perhaps inevitable, given the large numbers of persons who reside in and visit countries other than their own. It is difficult to believe that the contracting parties to the Vienna Convention would have agreed to Article 36 if they had anticipated that lapses in adherence to the notification requirement would vitiate the results of their domestic criminal justice systems.

2. Paraguay has relied on Santovincenzo v. Egan, 284 U.S. 30 (1931), Wildenhus's Case, 120 U.S. 1 (1887), and Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794), for the proposition that a foreign consul may seek enforcement of his rights in the courts of the United States (97-1390 Pet. 8 n.1). Those decisions,

however, do not support the proposition that Paraguay has a judicially enforceable remedy under the Vienna Convention to vacatur of a criminal conviction or sentence.

In Santovincenzo, the Court held that the Consul General of Italy was entitled, by operation of a bilateral treaty with the United States, to take possession of the assets of an Italian national, domiciled in the United States, who had died in New York intestate and without identified heirs. The question in that case was not whether the treaty provided the Italian Consul with a right of access to the courts, for under New York law, the decedent's estate was submitted to the courts for administration as a matter of course, pursuant to established state law procedures. The Italian Consul appeared in court as would any private party claiming a distribution from the estate, and such distributions were inherently likely to occur in probate court. The only issue to be decided in Santovincenzo was whether the treaty had given Italy a particular substantive right. See id. at 34-38.

In The Sloop Betsey, the Court rejected the contention, made by a French privateer who had captured a Swedish ship and brought it to Baltimore as prize, that the district court lacked admiralty jurisdiction to determine rights in the ship because exclusive jurisdiction (it was contended) lay only with French authorities. See 3 U.S. (3 Dall.) at 8-9 (argument of counsel). The Court, sua sponte, inquired of the parties whether French consuls in the United States might exercise prize jurisdiction

over captured ships brought here by French parties, in the absence of a treaty expressly providing for such jurisdiction, and answered that question in the negative. Id. at 15-16. The Court did not suggest that a French consul might invoke the jurisdiction of the federal courts in the first instance to have that question answered. The case was initiated in district court by a private libellant, pursuant to the customary manner of invoking admiralty jurisdiction by private parties. Id. at 6 (statement of case).

In Wildenhus's Case, the Court concluded that the Belgian Consul might rely on federal statutory provisions governing the writ of habeas corpus to vindicate his asserted right, under a bilateral convention with the United States, to exclusive jurisdiction over merchant seamen. 120 U.S. at 17. That convention and similar ones, however, were intended to curtail domestic criminal jurisdiction over aliens in certain circumstances. Id. at 14-16. Thus, although Belgium's substantive argument was ultimately rejected in that case, it was not difficult to conclude that the treaty provided the Belgian Consul with a judicial remedy to prevent New Jersey's allegedly unlawful interference with his exclusive jurisdiction and usurpation of jurisdiction over his charges. Nothing in the Vienna Convention confers a corresponding right on the consul of a foreign nation to obtain custody of one of its nationals who is detained by authorities in the receiving state; to the contrary,

the Convention plainly contemplates that the alien will remain in the custody of domestic authorities, in accordance with its laws.

Accordingly, no decision of this Court suggests that consular officials may sue in our domestic courts for a remedy for a past violation of rights afforded to consuls under a treaty, much less for vacatur of a criminal conviction. Whereas Santovincenzo and Wildenhus's Case did recognize, in certain circumstances, the possibility that consuls would be able to present their interests, secured by treaties, in courts, both of those cases involved treaties that were inherently directed at judicial proceedings (in Santovincenzo, probate proceedings, and in Wildenhus's Case, local criminal jurisdiction). The Vienna Convention does not have a similar focus on judicial proceedings and cannot reasonably be read to grant foreign consuls a cause of action in domestic courts.

3. The decision below does not conflict with any decision of any federal court of appeals or any state court of last resort. The only other federal appellate court that has addressed whether a foreign country may obtain judicial redress for a past violation of Article 36 has, like the court of appeals in this case, found such a claim to barred by the Eleventh Amendment. United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997), petition for cert. pending, No. 97-1365 (filed Feb. 18, 1998).

Paraguay has pointed to Republic of Argentina v. City of New York, 25 N.Y.2d 252 (1969), in which the New York Court of

Appeals held that, as a matter of customary international law, premises owned by a foreign country and devoted to consular purposes are exempt from municipal real property taxes.[5] That case, like Santovincenzo, did not require the recognition of an affirmative cause of action in U.S. courts at the behest of a foreign country, because Argentina invoked the generally applicable forms of action available under state law to entities seeking a declaration of tax immunity. See id. at 256. Thus, Argentina was in a position no different from, for example, a charitable institution contending that its property was immune from tax under domestic law. Indeed, the New York Court of Appeals denied Argentina's request for a refund of taxes paid in the past, because it had failed to comply with the generally applicable provisions of the City's Administrative Code for such refunds. Id. at 265.

4. In sum, although Article 36 of the Vienna Convention is unquestionably of great significance to the United States government, we believe that review is not warranted of Paraguay's contention that the Vienna Convention provides it with a cause of action by which it may obtain a judicially enforceable remedy in U.S. courts -- and here, the extraordinary remedy of setting aside a criminal conviction and sentence or enjoining execution of that sentence -- for a past violation of Article 36 with respect to one of its nationals. It is most implausible that the

---

[5] At the time of the decision in that case, the Senate had not yet ratified the Vienna Convention, which expressly makes consular premises exempt from municipal taxes. 25 N.Y.2d at 260.

contracting parties to the Convention intended such a remedy, and it is therefore not surprising that the decision below is not contrary to any decision of this Court, any federal court of appeals, any state supreme court, or (as far as we are aware) the court of any foreign nation.

B. Paraguay May Not Proceed Under The Treaty Of Friendship, Commerce, and Navigation

Paraguay also contends that Virginia authorities violated Article XII of the February 4, 1859, Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay, 12 Stat. 1092 (FCN Treaty), when they failed to inform the Paraguayan consular post that Breard had been arrested. Article XII states that the "consuls of the Republic of Paraguay in the United States of American shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any nation whatever." Ibid. Although that article does not explicitly refer to consular notification, Paraguay contends that, under Article XII's most-favored-nation clause, its consuls enjoy the right to be informed of the arrest of any Paraguayan national in the United States, because a similar right has been extended by the United States to other nations' consuls in bilateral consular conventions. See 97-1390 Pet. App. A37-A39 (consular conventions between U.S. and United Kingdom, USSR, and China).

Paraguay's argument fails on the merits. First, Article XII's reference to consular "privileges, exemptions, and immunities" does not encompass consular notification when

nationals are detained, but rather is intended to ensure that the United States does not impede the performance of official consular duties through judicial process or taxation. Thus, for consular officers, "privileges, exemptions, and immunities" extended by treaty clauses have traditionally included the inviolability of consular premises and archives, immunity from civil and criminal jurisdiction for official acts, and duty-free import and export of personal property. By contrast, the United States has traditionally limited mandatory consular notification to cases where alien detainees are nationals of a country with whom the United States has a bilateral agreement specifically requiring such notification. That practice is consistent with the position taken by the United States delegate at the Vienna Conference, where that delegate suggested that consular notification should be at the election of the alien detainee rather than automatic, because some aliens might not want their consular posts to be notified of their arrest.

Second, longstanding international practice has been to require countries claiming such "conditional" most-favored-nation benefits to trigger the process by sending a diplomatic note requesting the specific treatment given to a third nation and undertaking to accord reciprocal treatment to the United States. See F. McDowell, Digest of United States Practice in International Law 256 (1975). We have been informed by the Department of State that Paraguay has made no such request.

Thus, Paraguay cannot claim the most-favored-nation right allegedly at issue here.

Even if Paraguay's argument were correct on the merits, Paraguay nonetheless would not have a judicially enforceable cause of action to vacate Breard's conviction. As with the Vienna Convention, the text of the FCN Treaty gives no indication that the contracting parties intended it to provide judicially enforceable remedies for past violations as might be relevant here, and the same is true of various other consular conventions relied on by Paraguay requiring consular notification. Nor are we aware of any negotiating history to the FCN Treaty or other consular conventions or subsequent state practice that would suggest the availability of a judicial cause of action to remedy a past violation of a foreign country's right to consular notification.

C. Paraguay's Consul General May Not Proceed Under 42 U.S.C. 1983

There remains the question whether Paraguay's Consul General in the United States has a cause of action against Virginia authorities under 42 U.S.C. 1983 to remedy their violation of his asserted right to be informed of Breard's arrest, and his asserted right that Breard be advised of his own right to have the consular post notified of the arrest. That claim cannot be sustained. As an initial matter, it is clear that Paraguay itself could not proceed under Section 1983. Section 1983 protects the "rights" of "any citizen of the United States or other person within the jurisdiction thereof" from deprivation

under color of state law. Whereas a foreign country can be a "person" within the meaning of some federal statutes using that term, see Pfizer, Inc. v. India, 434 U.S. 308, 315-318 (1978) (India is a "person" within the coverage of the Sherman and Clayton Acts), Section 1983 was not intended to include sovereigns within its reach. Section 1983 was enacted to allow the enforcement by "private parties" of their civil rights against governmental actors, see Moor v. County of Alameda, 411 U.S. 693, 699 (1973), but political entities have no such civil rights. See South Carolina v. Katzenbach, 383 U.S. 301, 323-324 (1966) ("person[s]" protected by the Due Process Clause of the Fifth Amendment do not include States); cf. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) (State not a "person" that may be sued under Section 1983). And foreign countries like Paraguay are further excluded by the plain language of Section 1983 because they are not "within the jurisdiction of the United States." Therefore, the Convention does not extend to Paraguay any "rights" enforceable against the state respondents with respect to Breard's conviction by an action brought under Section 1983.

Consul General Gonzalez, acting in his official capacity, has no greater ability to proceed under Section 1983 than does the country he represents. Any rights the Consul General might have by virtue of the Vienna Convention or the FCN Treaty exist for the benefit of Paraguay, not for him as an individual. Thus, the Consul General has not sued because he has been deprived of

any rights he holds as a person, but only because the government of Paraguay is said to have certain treaty rights (such as gaining access to detained nationals), and he is the official agent of Paraguay authorized to exercise those rights. See 97-1390 Pet. App. A43 (noting that plaintiffs Ambassador and Consul General "bring this action in their official capacities as diplomatic and consular officers and on behalf of the Republic of Paraguay"). If Consul General Gonzalez were no longer the Paraguayan consul, he would have no access rights to Breard; his successor in office would have those rights, and indeed, the action under Section 1983 was brought by his predecessor in office, former Consul General Jose Antonio Dos Santos. See 97-1390 Pet. App. A43.

Moreover, like Paraguay, its official representative the Consul General is not a person "within the jurisdiction of the United States" who may bring suit under Section 1983. Consular officers have in all cases immunity for their official acts, and full diplomatic immunity when they are assigned to embassies. United States v. Wong Kim Ark, 169 U.S. 649, 678-691 (1898), is not to the contrary. Wong Kim Ark concerned the citizenship of a child born to alien parents (not a consul) in the United States. In the course of its lengthy discussion of past precedents, the Court explained that "consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as entrusted with authority to represent their sovereign in his intercourse with foreign

States or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside." Id. at 678-679. Insofar as that statement in Wong Kim Ark suggested that consuls may be prosecuted for their violations of domestic law (absent a treaty or other source of international law to the contrary), it is unexceptionable, but it is beside the point here. A consul may be "within the jurisdiction of the United States" in his individual capacity, but not his official capacity. Thus, if a consul were personally subject to arbitrary arrest by a state officer, he might be able to proceed on a Fourth Amendment claim under Section 1983; but he cannot use Section 1983 to vindicate the sovereign interests of the country he represents.

D. Considerations About This Court's Original Jurisdiction

Paraguay has suggested that a factor militating in favor of certiorari is that its petition falls within the Court's nonexclusive original jurisdiction as a "Case[] affecting Ambassadors, other public Ministers and Consuls." U.S. Const. art. III, § 2, cl. 2. Paraguay suggests that the Court should "presumptively" review cases within its original jurisdiction that arrive in the Court on petition for a writ of certiorari. 97-1390 Pet. 23. That submission is without merit.

First, although Consul General Gonzalez might be able, in some circumstances, to invoke the Court's original jurisdiction,

it is far from clear that the Court would have original jurisdiction over Paraguay's own asserted causes of action. Section 1651(b)(1) of Title 28 states: "[T]he Supreme Court shall have original but not exclusive jurisdiction of * * * [a]ll actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." That language does not include actions involving foreign nations themselves as parties. The language of Article III, Section 2, Clause 2, creating original jurisdiction over cases "affecting * * * Consuls," might be read more broadly than the statutory language (which focuses on the parties to the case rather than whom the case "affect[s]"). Nevertheless, the petition in No. 97-1390, which is in essence an action brought by Paraguay itself to have the conviction of one of its nationals set aside, rather than to protect the right of its consul as such, does not appear to be within the core of the Court's original jurisdiction, if within it at all.

Second, contrary to Paraguay's contention (Pet. 24), Article III does not indicate an intent by the Framers that any case involving the United States' treaty obligations to foreign sovereigns should presumptively be heard by this Court. The extension of federal judicial power in Article III, Section 2, Clause 1 to "all cases affecting Ambassadors, other public Ministers and Consuls" was likely intended for the principal purpose of ensuring that controversies potentially affecting the inviolability of ambassadors, foreign ministers, and consuls,

would be heard by the federal courts, which would give due consideration to the sovereign interests of the foreign country that were at stake. "It was deemed fit and proper that the courts of the government, with which rested the regulation of all foreign intercourse, should have cognizance of suits against the representatives of such foreign governments." Davis v. Packard, 32 U.S. (7 Pet.) 276, 284 (1833) (emphasis added); see also Valario v. Thompson, 7 N.Y. 576, 580 (1853) (Act of Congress providing exclusive federal jurisdiction over cases to which consuls are parties "prescribes the tribunal in which a consul in this country is to be called on to answer"). The Framers did not, however, vest original jurisdiction in this Court for cases affecting foreign nations, or cases involving treaty interpretation. And Congress, by giving the district courts concurrent jurisdiction over cases to which consuls are parties, as with other federal-question cases, has concluded that as a general matter, the lower courts may dispose of cases affecting consuls, subject to this Court's exercise of its certiorari jurisdiction under its usual standards.

Third, this Court has never stated that it presumptively reviews, by certiorari, cases that would fall within its original jurisdiction. To the contrary, the Court has declined original jurisdiction over many cases precisely because those cases could be adequately handled by the lower courts. A crucial factor affecting the Court's decision to exercise its nonexclusive original jurisdiction is "whether recourse to that jurisdiction *

* * is necessary for the [invoking party's] protection." Washington v. General Motors Corp., 406 U.S. 109, 113 (1972). In the absence of a showing that an inferior court could not afford adequate relief, "the availability of the federal district court as an alternative forum * * * suggest[s] that [the Court] remit the parties to the resolution of their controversies in the customary forum." Id. at 114; see also United States v. Nevada, 412 U.S. 534, 538 (1973) (per curiam) ("We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim."). Eleventh Amendment considerations aside, there is no doubt that the lower federal courts would have had adequate means to provide redress to Paraguay, had Paraguay presented a meritorious case. Thus, the mere fact that Consul General Gonzalez might theoretically have been able to invoke the original jurisdiction of this Court is not a compelling reason for the Court to grant certiorari on Paraguay's petition.

II. PETITIONER BREARD MAY NOT, IN HIS HABEAS CORPUS PETITION, SEEK TO INVALIDATE HIS CONVICTION AND SENTENCE BECAUSE OF A PAST VIOLATION OF THE VIENNA CONVENTION.

Petitioner Breard contends (97-8214 Pet. 15-23) that he is entitled to have his capital murder conviction and death sentence vacated because of the failure of Virginia authorities to apprise him following his arrest of the right of consular notification under Article 36(1) of the Vienna Convention. There are, however, insurmountable obstacles to Breard's ability to raise that contention in a petition for a writ of habeas corpus (whether in his petition filed originally in district court or his petition for an original writ filed in this Court). The court of appeals ruled that Breard's effort to raise that claim was barred by his procedural default in having failed to raise it at trial or on direct appeal. That ruling was correct, is not in conflict with any decision of this Court or any other court of appeals, and represents a straightforward application of well-settled principles governing the writ of habeas corpus.

Moreover, for essentially the same reasons as those set forth in our discussion of the Vienna Convention -- especially the preamble to the Convention, which expresses the contracting parties' "realiz[ation] that the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States," 21 U.S.T. at 79 -- we do not believe that Breard could obtain relief from his conviction and sentence because of a violation of the Vienna Convention even on direct

appeal. The Court need not reach that question in this case, however, for it is clear that a remedy for a violation of Article 36 is not available here on habeas corpus.

A. Breard concedes (97-8214 Pet. 3) that his counsel failed to raise any claim based on an alleged violation of the Vienna Convention at trial, on direct appeal, or in the state habeas proceedings. Under this Court's well settled habeas jurisprudence, Breard's consular notification claim is procedurally defaulted and is not cognizable on federal habeas corpus in the absence of an affirmative demonstration of cause and prejudice. See Gray v. Netherland, 116 S. Ct. 2074, 2080-2081 (1996); Coleman v. Thompson, 501 U.S. 722, 729-731 (1991). In comparable circumstances, this Court has recently denied a certiorari petition and a stay request in other cases in which state prisoners have sought to litigate defaulted consular notification claims. See Murphy v. Netherland, 118 S. Ct. 26 (1997); In re Montoya, 117 S. Ct. 2476 (1997). There is no reason for a different result here.

Seeking to avoid the consequences of his failure to raise the consular notification claim in a timely fashion, Breard argues that the Vienna Convention became the "supreme law of the land" upon its proclamation by the President after advice and consent by the Senate, and therefore the judicially created doctrines of procedural default that ordinarily apply in domestic litigation are necessarily inapplicable when a violation of the Convention's consular notification provisions is alleged as a

ground for relief in a criminal case. Nothing in the language of the Vienna Convention or in its negotiating history, however, suggests that United States courts may not insist that claims based on alleged violations of the Convention -- to the extent that they are cognizable at all when asserted by a criminal defendant -- be raised in a timely fashion.

Indeed, Article 36(2) expressly provides that the consular notification rights identified in Article 36(1)(b) "shall be exercised in conformity with the laws and regulations of the receiving [nation]," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this [A]rticle are intended." The procedural requirements for orderly presentation of claims and objections to a trial court of criminal jurisdiction are surely valid "laws and regulations" of the United States with which any claim of a failure of consular notification must comply. Application of procedural default rules for failure to comply with those requirements does not interfere with the purposes of consular notification; in fact, by requiring the prompt presentation of claims of violations of Article 36, procedural default rules ensure that any violations of Article 36 will be swiftly brought to the attention of authorities and then resolved.

Without doubt, "Treaties made * * * under the Authority of the United States[] shall be the Supreme Law of the Land." U.S. Const., Art. VI, cl. 2. That is no less true of the Constitution

itself, however, and yet this Court has routinely applied its procedural default jurisprudence to bar consideration in habeas corpus proceedings of claims based on alleged violations of constitutional provisions. See, e.g., Gray v. Netherland, 116 S. Ct. at 2080-2081 (1996) (due process Brady claim barred by procedural default); United States v. Frady, 456 U.S. 152, 167-168 (1982) (claim that defective jury instruction unconstitutionally relieved the government of its burden of proving an element of the offense barred by procedural default). The Court has also recognized the applicability of procedural default rules to alleged Miranda violations, to which Breard analogizes (97-8214 Pet. 6) the consular notification provisions at issue here. See Ylst v. Nunnemaker, 501 U.S. 797 (1991); see also Wainwright v. Sykes, 434 U.S. 72, 87-88 (1977) (procedural default rules applicable to voluntariness claims). There is no basis for a conclusion that a claim based on a treaty provision may not be procedurally defaulted, even though claims based upon alleged violations of specific constitutional provisions are routinely subject to the operation of procedural default rules.

Furthermore, treaty provisions, when they give rise to judicially cognizable rights, are regarded "as equivalent to an act of the legislature." Foster v. Neilson, 27 U.S. (2 Pet.) at 314. This Court has noted that "the established rule with respect to nonconstitutional [i.e., statutory] claims" is that they are cognizable on habeas only if thealleged error "constituted a fundamental defect which inherently results in a

complete miscarriage of justice." Reed v. Farley, 512 U.S. 339, 354 (1994) (internal quotation marks omitted). As we discuss further below, Breard has not shown a miscarriage of justice in his case; accordingly, it is doubtful his treaty claim is cognizable on habeas at all.

B. Breard contends (97-8214 Pet. 20-23) that his procedural default should be excused. A procedurally defaulted claim such as Breard's is reviewable on federal habeas only if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. at 750. Breard claims he had cause for not earlier raising a claim based on a Vienna Convention treaty provision that has continuously been in effect since 1969 because the claim "was so novel that its legal basis was not reasonably available" until a reported Fifth Circuit opinion in 1996. 97-8214 Pet. 20-21 (citing Faulder v. Johnson, 81 F.3d 515 (5th Cir.), cert. denied, 117 S. Ct. 487 (1996)). Cause for a procedural default may be found "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of the state proceedings. Reed v. Ross, 468 U.S. 1, 16 (1984). The "question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the

claim was 'available' at all." Smith v. Murray, 477 U.S. 527, 537 (1986).[6]

Breard's argument based on the novelty of his claim, however, indicates that his claim is a "new rule" not cognizable on habeas under Teague v. Lane, 489 U.S. 288 (1989). Teague holds that a procedural rule is "new" and generally unavailable on habeas unless "a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." Lambrix v. Singletary, 117 S. Ct. 1517, 1524 (1997) (punctuation omitted). Accord O'Dell v. Netherland, 116 S. Ct. 1969, 1574-1576 (1996); Goeke v. Branch, 115 S. Ct. 1257 (1995) (per curiam); Caspari v. Bohlen, 510 U.S. 383 (1994); Graham v. Collins, 506 U.S. 461 (1993). The courts of appeals have agreed that a claim so novel as to provide cause under Reed is also a new rule that cannot be raised on habeas under Teague. See Gacy v. Welborn, 994 F.2d 305, 311 (7th Cir.)

---

[6] In our view, Breard cannot satisfy this standard because (as the court of appeals noted) the Convention has been in effect since 1969, is published at 21 U.S.T. 77, has been mentioned in several reported decisions, and therefore would have been found upon a reasonably diligent search by competent counsel. See also Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir.) (collecting Vienna Convention cases), cert. denied, 118 S. Ct. 26 (1997). Breard contends, however (97-8214 Pet. 22), that state officials "ignored their legal duty" under the Vienna Convention and thereby "effectively 'concealed'" the treaty from defense counsel. This case bears no resemblance to Amadeo v. Zant, 486 U.S. 214, 224 (1988), where state authorities concealed a "handwritten, unsigned, unstamped, and undesignated" memorandum that was not "intended for public consumption." Here, unlike in Amadeo, the provision upon which petitioner relies has been on the public books for more than a quarter-century.

(en banc) ("Any claim sufficiently novel that it was unavailable during the state proceedings must be a 'new rule' under Teague"), cert. denied, 510 U.S. 899 (1993); Selvage v. Collins, 975 F.2d 131, 136 (5th Cir.) ("[A] rule found novel for cause purposes will not be available in a federal habeas proceeding, and * * * a determination that a rule will be applied precludes a finding that the claim's novelty constitutes cause"), cert. denied, 508 U.S. 952 (1993); Hopkinson v. Shillinger, 888 F.2d 1286, 1290 (10th Cir. 1989) (en banc) ("[A] holding that a claim is so novel that there is no reasonably available basis for it, thus establishing cause, must also mean that the claim was too novel to be dictated by past precedent"), cert. denied, 497 U.S. 1010 (1990).

This Court has never decided whether there should be any remedy in a criminal case for a violation of Article 36, and it would be inappropriate to decide that issue for the first time on habeas corpus. The Court has emphasized that the availability of habeas corpus "serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established [federal] standards." Teague, 489 U.S. at 306 (emphasis added; internal quotation marks omitted). But in this and other criminal proceedings involving foreign nationals, courts have conducted their proceedings in reliance on the present state of the law, which does not dictate any remedy for a violation of Article 36. "The interest in leaving concluded litigation in a state of

repose, that is, reducing the controversy to a final judgment not subject to further judicial revision," ibid., counsels against recognition of a substantial and dramatic new rule of criminal procedure based on the Vienna Convention (such as suppression of evidence or, as petitioner evidently requests, complete vitiation of the criminal trial) in a collateral proceeding.[7]

Nor could Breard's consular notification claim, if judicially recognized as a basis for vacating an otherwise valid and final criminal conviction and sentence, qualify for retroactive application on habeas corpus under Teague's exception for newly declared "watershed" legal rules. Although "the precise contours of this exception may be difficult to discern," Saffle v. Parks, 494 U.S. 484, 495 (1990), the Court stated that (1) a qualifying procedural rule "must not only improve accuracy, but [must] alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," Sawyer v. Smith, 497 U.S. 227, 242 (1990) (emphasis and internal quotation marks omitted); (2) the right of the accused to counsel in all criminal prosecutions for serious criminal offenses represents "the paradigmatic example" of a "watershed" procedural rule under

---

[7] Breard does not argue, and clearly cannot show, that holding him to his procedural default would constitute a miscarriage of justice. The court of appeals noted that petitioner Breard is not "actually innocent of the offense he committed or innocent of the death penalty in the sense that no reasonable juror would have found him eligible for the death penalty." 97-1390 Pet. App. A30-A31. To the contrary, his guilt was established not only by overwhelming forensic evidence, including DNA matching, but also by his highly inculpatory testimony at both the guilt and penalty phases of his trial.

Teague's exception (Gray v. Netherland, 116 Ct. at 2085; Saffle v. Parks, 494 U.S. at 495)); and (3) occasions for invoking the Teague exception will be necessarily rare, as it is "unlikely that many such components of basic due process have yet to emerge" (Teague, 489 U.S. at 243).

Article 36(1)'s consular notification provisions do not constitute a basic component of due process, comparable to an accused's right to be represented by counsel. While post-arrest consular notification may aid a detained foreign national in arranging for counsel and in otherwise pursuing his defense against criminal charges, Breard, like all defendants charged in federal or state courts with serious charges, was constitutionally entitled to the assistance of counsel, and in fact appointed, competent counsel was furnished to him in this case.

C. Breard has also filed a petition for an original writ of habeas corpus in this Court. That petition does not provide any basis for overlooking his procedural default. In Felker v. Turpin, 116 S. Ct. 2333 (1996), this Court noted that its "authority to grant [original] habeas relief to state prisoners is limited by [28 U.S.C.] 2254, which specifies the conditions under which such relief may be granted to a person in custody pursuant to the judgment of a State court." Id. at 2339 (internal quotation marks omitted). The procedural default rules governing the availability of habeas corpus in the lower courts under Section 2254 (and in this Court on certiorari review

therefrom) should also "inform [this Court's] authority to grant such relief as well" on a petition for an original writ. Ibid. Breard's claim based on the Vienna Convention presented on his petition for an original writ of habeas corpus should therefore be deemed barred by his procedural default.

III. NOTWITHSTANDING THE RECENT ORDER OF THE INTERNATIONAL COURT OF JUSTICE, PETITIONERS HAVE NOT SHOWN THAT A JUDICIAL STAY OF EXECUTION IS WARRANTED

A. The International Court of Justice (ICJ) has, upon an application by Paraguay against the United States, indicated provisional measures that ought to be taken, to the effect that "[t]he United States should take all measures at its disposal" to ensure that Breard is not executed pending the ICJ's final decision. The Executive Branch, on behalf of the United States, takes the order recently entered by the ICJ very seriously, even though the United States argued against that court's jurisdiction and against the indication of provisional measures. Accordingly, in response to the ICJ's order, the Secretary of State is today requesting that the Governor of Virginia stay Breard's execution. See App. F, infra.

What the Executive Branch of the federal government may or should do in response to the ICJ's order, however, is a different question from what the Judicial Branch may do in enforcing federal law that has been made applicable to create enforceable rights in court. As we explain below, the ICJ order does not alter the essence of the Court's task on the applications for a

stay of execution. Moreover, stays of execution in capital cases are subject in general to the same standards as those governing stays in other cases. There must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari; there must a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed. Barefoot v. Estelle, 463 U.S. 880, 895-896 (1983). In addition, it may be appropriate, as in any stay application, to consider the harm to other parties that would result from the grant of a stay, and the public interest. See Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Application of those standards leads to the conclusion that a judicial stay of execution is not warranted.

B. As to the merits, we have explained above why respondents' various claims fail; we believe the law is sufficiently clear that a stay would not be warranted. Our view of the merits is not changed by the recent order of the ICJ. The indication of provisional measures by the ICJ does not represent even tentative agreement with the merits of Paraguay's argument to that court that the Vienna Convention provides a remedy of vacatur of a criminal conviction.[8] The indication of

---

[8] The United States has argued to the ICJ that the application brought by Paraguay does not come within that court's jurisdiction under the Optional Protocol for disputes arising under the Vienna Convention. We have argued that the case does

(continued...)

provisional measures is, therefore, significantly different from a grant of a preliminary injunction or application for a stay familiar to the Court under U.S. law. The ICJ's order notes, in fact, that "the existence of relief sought by Paraguay under the Convention can only be determined at the stage of the merits," 97-8214 Supplemental Brief in Support of Application for a Stay of Execution, Exh. C, ¶ 33, and that "measures indicated by the [ICJ] for a stay of execution would necessarily be provisional in nature and would not in any way prejudge the findings the Court might make on the merits," id. ¶ 40.

C. As to the balance of hardships, there can be no doubt of the irreparable harm to Breard from the carrying out of his sentence of execution; but that irreparable harm, in and of itself, cannot warrant a stay of execution in the absence of a reasonably persuasive showing on the merits (unless every application for a stay of execution were to be granted). And, of course, the State of Virginia would be harmed by an order preventing it from carrying out its lawfully entered judgment of execution in a timely fashion, despite the fact that the sentence complies with constitutional requirements and that the arguments presented in these cases about the Vienna Convention provide no basis for relief.

---

[8](...continued)
not involve the "interpretation or application" of the Convention, within the meaning of the Optional Protocol, because it is not disputed that the Convention was violated, and because the Convention does not provide the remedy that Paraguay is seeking.

D. As to the public interest, petitioners contend that this Court should stay the execution, either as a matter of comity or (they argue) because the ICJ's order is binding. Concerning the issue of comity, we emphasize again that the Secretary of State is requesting that the Governor of Virginia stay Breard's execution. There is little prospect, therefore, that the international community will view the United States government's response to the ICJ's order as indicating disrespect to that court's processes.

As to the purportedly binding effect of the ICJ's order, there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding. See Restatement (Third) of Foreign Relations Law of the United States § 903, Reporter's Note 6, at 369-370 (1986). The better reasoned position is that such an order is not binding. Article 41(1) of the ICJ statute provides that the ICJ shall have "the power to indicate any provisional measures which ought to be taken to preserve the respective rights of either power." Article 41(2) further states that, "[p]ending the final decision [of the ICJ], notice of the measures suggested shall forthwith be given to the parties and the Security Council." The use of precatory language ("indicate," "ought to be taken," "suggested") instead of stronger language (e.g.: the ICJ may "order" provisional measures that "shall" be taken) strongly supports a conclusion that ICJ provisional measures are not binding on the parties. The distinction in Article 41(2) between the "final decision"

ultimately foreseen and the "measures suggested" in the interim also suggests that the "measures suggested" are not binding.

Petitioners have relied on the United Nations Charter to argue that provisional measures are binding, but the language of the Charter does not support that conclusion. Article 94(1) provides that "[e]ach member * * * undertakes to comply with the decision of the [ICJ] in any case to which it is a party." (Emphasis added.) "The decision," in the context of Article 94(1) of the Charter, evidently refers to the final decision of the International Court. Article 94(2) of the Charter elaborates that "[i]f any party to a case fails to perform the obligations incumbent upon it by a judgment rendered by the [ICJ], the other party may have recourse to the Security Council." (Emphasis added.) Significantly, the Security Council has never acted to enforce provisional measures indicated by the ICJ. See Restatement, supra, at 368 (discussing Security Council's response to ICJ's order indicating provisional measures in dispute between United Kingdom and Iran).

Moreover, the ICJ itself has never concluded that provisional measures are binding on the parties to a dispute. That court has indicated provisional measures in seven other cases of which we are aware; in most of those cases, the order indicating provisional measures was not regarded as binding by the respondent. See Restatement, supra, at 368-369 (discussing Australia and New Zealand v. France, 1975 I.C.J. 99, 106; United States v. Iran, 1979 I.C.J. 20-21; Nicaragua v. United States,

1984 I.C.J. 392, 422, and United Kingdom v. Iran, 1951 I.C.J. 89, 93-94); see also 1972 I.C.J. 17 (indicating provisional measures in United Kingdom v. Iceland). The ICJ did not, in any of the final decisions in those cases, suggest that the failure of the respondent to comply with the indication of provisional measures had violated the court's earlier order.

Finally, even if parties to a case before the ICJ are required to heed an order of that court indicating provisional measures, the ICJ's order in this case does not require this Court to stop Breard's execution. That order states that the United States "should" take all measures "at its disposal" to ensure that Breard is not executed. The word "should" in the ICJ's order confirms our understanding, described above, that the ICJ order is precatory rather than mandatory. But in any event, the "measures at [the government's] disposal" are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The "measures at [the United States'] disposal" under our Constitution may in some cases include only persuasion -- such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution -- and not legal compulsion through the judicial system. That is the situation here. Accordingly, the ICJ's order does not provide an independent basis for this Court either to grant certiorari or to stay the execution.

## CONCLUSION

The petitions for a writ of certiorari should be denied. The applications for a stay should also be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID R. ANDREWS
Legal Adviser
Department of State

FRANK W. HUNGER
Assistant Attorney General

JOHN C. KEENEY
Acting Assistant Attorney General

EDWIN S. KNEEDLER
MICHAEL R. DREEBEN
Deputy Solicitors General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

ROBERT J. ERICKSON
MARK B. STERN
SEAN CONNELLY
H. THOMAS BYRON, III
Attorneys

APRIL 1998

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

April 13, 1998

Honorable William K. Suter, Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Paraguay v. Gilmore, No. 97-1390;
Breard v. Greene, No. 97-8214

Dear Mr. Suter:

Attached is Appendix F to the Brief for the United States As Amicus Curiae in the above-captioned cases.

Sincerely,

Seth P. Waxman

Seth P. Waxman
Solicitor General

cc: attached service list

# APPENDIX A

**VIRGINIA:**

**IN THE CIRCUIT COURT OF ARLINGTON COUNTY**

**COMMONWEALTH OF VIRGINIA,**

**v.** **Docket Nos. CR92-1467, 1664-1668**

**ANGEL BREARD,**

**Defendant.**

**ORDER**

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Angel Breard be carried out on the 14th day of April, 1998, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before April 14, 1998, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

EXHIBIT
A

The Honorable Richard Trodden
Commonwealth's Attorney
Arlington County
1425 North Courthouse Road
Arlington, Virginia 22201

William G. Broaddus
McGuire, Woods, Battle & Boothe
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 25th day of February, 1998.

Judge



A COPY
TESTE: DAVID A. BELL, CLERK
BY DEPUTY CLERK

FILED: March 27, 1998

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

---

No. 96-25
(CA-96-366-3)

---

ANGEL FRANCISCO BREARD,

Petitioner - Appellant,

versus

SAMUEL V. PRUETT, Warden, Mecklenburg Correctional Center,

Respondent - Appellee.

---

THE HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION,

Amicus Curiae.

---

ORDER

---

Appellant has filed an application to recall mandate and stay execution and appellee has filed a response in opposition.

The Court denies the application to recall mandate and stay execution.

EXHIBIT
B

Entered at the direction of Judge Hamilton, with the concurrence of Judge Williams and Senior Judge Butzner.

For the Court

/s/ Patricia S. Connor

Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,

v. Docket Nos. CR92-1467, 1664-1668

ANGEL BREARD,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Angel Breard be carried out on the 14th day of April, 1998, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before April 14, 1998, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

The Honorable Richard Trodden
Commonwealth's Attorney
Arlington County
1425 North Courthouse Road
Arlington, Virginia 22201

William G. Broaddus
McGuire, Woods, Battle & Boothe
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 25th day of February, 1998.

Judge



A COPY
TESTE: DAVID A. BELL, CLERK
BY _____
DEPUTY CLERK

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY V. UNITED STATES OF AMERICA)

---

**APPLICATION INSTITUTING PROCEEDINGS SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF PARAGUAY**

---

TO: Mr. Eduardo Valencia-Ospina
Registrar
International Court of Justice
Peace Palace
The Hague
The Netherlands

Sir:

On behalf of the Republic of Paraguay and in accordance with article 40, paragraph 1, of the Statute of the Court and article 38 of the Rules of the Court, I respectfully submit this Application instituting proceedings in the name of the Government of the Republic of Paraguay against the Government of the United States of America for violations of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention"). The Court has jurisdiction pursuant to article I of the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes.

## Preliminary Statement

1. Article 36, subparagraph 1(b) of the Vienna Convention requires the competent authorities of a State Party to advise, "without delay," a national of another State Party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by article 36. "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State

if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner." *Id.*

2. As the Government of the United States stated in its Memorial in the *Case Concerning United States Diplomatic and Consular Staff in Tehran:*

> a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations. Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.

1980 I.C.J. Pleadings 174 (citations omitted).

3. In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna Convention, such authorities tried and convicted Mr. Breard and sentenced him to death.

4. These actions violated the obligations owed by the United States to Paraguay under the Vienna Convention. As a result of the breach, Paraguay is entitled to *restitutio in integrum*: the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention.

## I. THE FACTS

### Municipal Court Proceedings Concerning Mr. Breard

5. On 1 September 1992, law enforcement authorities of Virginia arrested Mr. Breard on suspicion of murder. Although aware of Mr. Breard's Paraguayan nationality, the authorities at no time informed Mr. Breard of his rights to consular

assistance under article 36, subparagraph 1(b) of the Vienna Convention. Nor did the authorities ever advise Paraguayan consular officers of Mr. Breard's detention. Unaware of, and not having been apprised of, these rights, Mr. Breard could not and did not exercise them before his trial.

6. Had Mr. Breard been properly informed of his rights under the Vienna Convention, he would have communicated with his Consul, seeking the assistance provided for in article 36. In turn, Paraguay would have rendered that assistance.

7. The failure to provide the notification required by the Vienna Convention thus precluded Paraguay from protecting its interests in the United States as provided for in articles 5 and 36 of the Vienna Convention. Among other things, Paraguay could not contact its national, assist in the defense of its national (as described in paragraphs 8 and 10 below), monitor the conditions of its national's detention, or ensure that international legal norms were respected in the treatment of, and proceedings against, its national.

8. The failure to provide the required notification also precluded Paraguay from protecting its national's interests in the United States as provided for in articles 5 and 36 of the Vienna Convention. The authorities of Virginia effectively prevented Paraguayan consular officers from arranging for appropriate legal representation of Mr. Breard. Instead, the authorities themselves arranged for Mr. Breard to be represented by court-appointed counsel who were unfamiliar with Paraguayan culture and with the preconceptions concerning the criminal justice system that a Paraguayan national might be expected to have.

9. As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation. He refused to accept the authorities' offer of life in prison in exchange for his pleading guilty to the crime. Instead, Mr. Breard insisted on risking a death sentence and confessing and denouncing his past criminal conduct at trial. Mr. Breard took these highly detrimental steps because – in the absence of advice from his consulate – he did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay. Whereas Mr. Breard believed his confession and denunciation would appeal to the mercy of the American court, as he understood they would a court in Paraguay, in reality these acts virtually assured Mr. Breard's conviction and death sentence.

10. Consular assistance would have included advice on cultural and legal differences between Paraguay and the United States, including the desirability of

accepting or rejecting plea offers in light of those differences; an interpreter; appropriate additional or other legal counsel; identifying and communicating with family members who could provide assistance and information; supplying records, documents, and other evidence helpful to Mr. Breard's defense; transport of family members and other witnesses to Virginia to provide testimony; attendance by consular officers at court or other proceedings; collecting and presenting mitigating evidence at the sentencing phase; and other forms of assistance both legal and non-legal. Such consular assistance would have affected the result of the criminal proceeding against Mr. Breard, including any sentence imposed.

11. On 24 June 1993, Mr. Breard was convicted of murder. On 22 August 1993, the trial court imposed a death sentence. Mr. Breard's direct appeals of the conviction and sentence were denied, as was his petition to the state courts for a writ of *habeas corpus*, a collateral proceeding seeking relief from unlawful detention.

12. In the Spring of 1996, Paraguay, without benefit of information from the authorities of Virginia and the United States, finally learned that Mr. Breard was imprisoned in the United States and awaiting execution. Immediately upon learning of his situation, Paraguay, through its embassy and consulate, began rendering assistance, both legal and otherwise, to Mr. Breard. Until contacted by the Paraguayan consular representatives at that time, Mr. Breard had been entirely unaware of his rights under the Vienna Convention.

13. On 30 August 1996, with the assistance of Paraguayan consular officers, Mr. Breard took the final step available to him for challenging his conviction and sentence by filing a petition to the federal court of first instance for a writ of *habeas corpus*. For the first time, Mr. Breard claimed violations of the Vienna Convention. That court rejected the assertion of this and other claims based on a municipal law doctrine of "procedural default." *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996). Applying this doctrine, the court decided that, because Mr. Breard had not asserted his rights under the Vienna Convention in his previous legal proceedings, he could not assert them in the federal *habeas* proceeding. This municipal law doctrine was held to bar such relief even though, first, Mr. Breard was unaware of his rights under the Convention at the time of the earlier legal proceedings, and second, he was unaware of his rights precisely because the local authorities failed to comply with their obligations under the Convention promptly to inform him of those rights. The intermediate federal appellate court affirmed. *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). Mr. Breard's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to him as of right.

14. In light of the federal appellate court's affirmance of the federal trial court's denial of Mr. Breard's *habeas* petition, the Virginia court that sentenced Mr. Breard has set an execution date of 14 April 1998. Absent intervention, officials of Virginia will then, in the words of the authorizing statute, "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead." VA. STAT. ANN. § 53.1-234.

15. By petition for a writ of *certiorari*, Mr. Breard has now requested that the United States Supreme Court exercise its discretionary authority to review the lower federal courts' decision against him and grant a stay of his execution pending that review. The Supreme Court grants less than five percent of all *certiorari* petitions submitted to it. Moreover, in cases, such as Mr. Breard's, involving an imminent execution and submitted on an expedited basis, the Court frequently does not rule on the petition and accompanying request for interim relief until days, or even hours, before the scheduled execution.

Paraguay's Efforts To Secure
Relief In The United States

16. On 16 September 1996, the Republic of Paraguay filed its own civil lawsuit in a federal court of first instance against the municipal officials responsible for Mr. Breard's arrest, conviction, continuing imprisonment, and pending execution, alleging violations of the Vienna Convention. Paraguay sought, among other relief, an order vacating Mr. Breard's conviction, barring the municipal officials from taking any future actions based on that conviction, including refraining from putting Mr. Breard to death, and requiring those officials to afford Paraguay its rights under the Convention in any future proceedings should Virginia, as Paraguay would expect, seek to prosecute Mr. Breard anew.

17. Paraguay did not seek from the federal court of first instance, and does not intend to seek from this Court, any relief barring the competent authorities of the United States from enforcing its criminal law or, specifically, retrying Mr. Breard if the competent authorities are so advised. Paraguay does contend, however, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States in the Vienna Convention.

18. On 27 November 1996, without having considered the merits of Paraguay's claim, the federal court of first instance held that it could not take

jurisdiction of the case because it was barred by a municipal doctrine providing sovereign immunity to the several states that comprise the United States. *Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996). Paraguay appealed the decision, which was affirmed. *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998). During the appellate proceedings, the United States took the position that although the Vienna Convention is of great importance to United States nationals abroad, the issue of its own violation of the Convention was not justiciable in the courts of the United States in an action brought by another State Party to the Convention.

19. Paraguay has filed a petition for a writ of *certiorari* in the United States Supreme Court seeking review of the appellate decision. As explained above, a petition for *certiorari* is a matter of the Supreme Court's discretion and is rarely granted.

20. In addition to its efforts to have its claim heard in the courts of the United States, Paraguay has also engaged in diplomatic efforts to gain the assistance of the United States in remedying the effect of the breach of the Vienna Convention. In a letter dated 10 December 1996, the Ambassador of Paraguay sought the good offices of the United States Department of State, "in order that a new trial may be granted Paraguayan citizen Angel Breard within the framework of constitutional guarantees for proper defense against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature." In a response delivered 3 June 1997, the Department of State expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights under the Treaties.

## II. THE JURISDICTION OF THE COURT

21. Under article 36, paragraph 1 of the Statute of the Court, "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force."

22. The Republic of Paraguay and the United States are, as members of the United Nations, parties to the Statute, and are parties to the Vienna Convention and to its Optional Protocol Concerning the Compulsory Settlement of Disputes. Article 1 of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the

International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

23. Paraguay therefore submits that, upon the filing of the present application, the matters in dispute between Paraguay and the United States concerning Paraguay's claims under the Vienna Convention lie within the compulsory jurisdiction of the Court.

## III. THE CLAIMS OF THE REPUBLIC OF PARAGUAY

24. The Government of the Republic of Paraguay claims that:

a. Pursuant to article 36, subparagraph 1(b) of the Vienna Convention, the United States is under the international legal obligation to Paraguay, a State Party to the Convention, to inform "without delay" any Paraguayan national, such as Mr. Breard, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his rights under that subparagraph. These rights include:

i. the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

ii. the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay."

The United States has violated and is currently violating the foregoing obligations.

b. Pursuant to article 36, subparagraph 1(b) of the Vienna Convention, the United States is under the international legal obligation to an arrested national of Paraguay, such as Mr. Breard, to inform him "without delay" of his rights under that subparagraph. These rights include:

i. the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

ii. the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay."

The United States has violated and is currently violating the foregoing obligations with respect to Mr. Breard.

c. Pursuant to article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Paraguay can communicate with and assist an arrested national prior to trial. Its failure to provide the notifications required by article 36, subparagraph 1(b) of the Vienna Convention has effectively prevented Paraguay from exercising its right to carry out consular functions pursuant to articles 5 and 36 of the Convention. The United States therefore has violated and is currently violating the foregoing obligation.

d. Pursuant to article 36, paragraph 2, of the Vienna Convention and article 26 of the Vienna Convention on the Law of Treaties (done on 23 May 1969), the United States is under an international legal obligation to ensure that its municipal law and regulations enable full effect to be given to the purposes of the rights accorded under article 36. The United States has violated and is currently violating the foregoing obligation.

e. Pursuant to article 27 of the Vienna Convention on the Law of Treaties and to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or judicial power. The United States has violated and is currently violating the foregoing obligation.

## IV. THE JUDGMENT REQUESTED

25. Accordingly, the Republic of Paraguay asks the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default," or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the nonrepetition of the illegal acts.

## V. JUDGE *AD HOC*

26. In accordance with the provisions of article 31 of the Statute and article 35, paragraph 1, of the Rules, the Republic of Paraguay declares its intention to exercise its right to name a judge *ad hoc*.

## VI. RESERVATION OF RIGHTS

27. The Republic of Paraguay reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

## VII. PROVISIONAL MEASURES

28. The Republic of Paraguay requests that the Court indicate interim measures of protection, as set forth in a separate request filed concurrently with this Application.

* *

I have the honor to reassure the Court of my highest esteem and consideration.

Brussels, 3 April 1998

His Excellency Manuel María Cáceres
Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY V. UNITED STATES OF AMERICA)

---

**REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF PARAGUAY**

---

Brussels, 3 April 1998

1. I have the honor to refer to the Application submitted to the Court this day instituting proceedings in the name of the Republic of Paraguay against the Government of the United States of America and to submit, in accordance with article 41 of the Statute of the Court and articles 73, 74, and 75 of the Rules of the Court, an urgent request that the Court indicate provisional measures to preserve the rights of the Republic of Paraguay. The Court has jurisdiction pursuant to article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations.

2. The compelling facts underlying this request are set forth in the Application. On 1 September 1992, law enforcement officials of the Commonwealth of Virginia, one of the United States of America, arrested a national of Paraguay, Angel Francisco Breard. Mr. Breard was subsequently convicted and sentenced to death. At no time did these officials inform Mr. Breard of his right to communicate with his consulate, as required under article 36 of the Vienna Convention. Mr. Breard was and thus remained unaware of his rights under the Convention. As a result, Paraguay was not alerted to Mr. Breard's situation and was unable to exercise its right to render consular assistance until after he had already been tried, convicted, and sentenced.

3. Paraguay was therefore unable to protect its interests as provided for in articles 5 and 36 of the Vienna Convention. Similarly, it was unable to protect its detained national's interests as provided for in those articles.

4. As set forth in the Application, Paraguay submits that the actions of the Virginia officials, attributable to the United States, violated international legal obligations that the United States owes to Paraguay in its own right and in the exercise of its right of diplomatic protection of its national. As further set forth in the Application, Paraguay has requested that the Court declare that the United States has violated its obligations under the Vienna Convention; that the United States is obligated to restore the *status quo ante*; and that the United States is obligated to ensure that any future detention of or criminal proceedings against Mr. Breard or any other Paraguayan national in its territory be carried out in conformity with the international legal obligations the United States owes Paraguay.

5. By order dated 25 February 1998, the Circuit Court of Arlington County, Virginia, United States of America, has ordered that on **14 April 1998**, pursuant to Virginia Code § 53.1-234, Mr. Breard be electrocuted or injected with a lethal substance until he is dead.

6. The importance and sanctity of an individual human life are well established in international law. As recognized by article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law.

7. Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favor.

8. On behalf of the Government of Paraguay, I therefore respectfully request that, pending final judgment in this case, the Court indicate:

a. That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;

b. That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph (a) immediately above and the results of those actions; and

c. That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case.

9. In view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Paraguayan citizen in violation of obligations the United States owes to Paraguay, Paraguay respectfully asks the Court to treat this request as a matter of the greatest urgency.

10. The Government of the Republic of Paraguay has authorized the undersigned to appear before the Court in any proceedings or hearings relating to this request that the Court may convene in accordance with the terms of article 74, paragraph 3, of the Rules of the Court.

His Excellency Manuel María Cáceres
Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands

General List No. 99

INTERNATIONAL COURT OF JUSTICE
9 April 1998

# CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY *v.* UNITED STATES OF AMERICA)

# REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

# ORDER

*Present*: *Vice-President* WEERAMANTRY, *Acting President*; *President* SCHWEBEL; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Registrar* VALENCIA-OSPINA.

**The International Court of Justice,**

**Composed as above,**

**After deliberation,**

**Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,**

**Having regard to the Application filed in the Registry of the Court on 3 April 1998, whereby the Republic of Paraguay (hereinafter "Paraguay") instituted proceedings against the United States of America (hereinafter "the United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter the "Vienna Convention") allegedly committed by the United States,**

***Makes the following Order:***

1. Whereas, in its aforementioned Application, Paraguay bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations ("the Optional Protocol");

2. Whereas, in the Application, it is stated that in 1992 the authorities of the Commonwealth of Virginia arrested a Paraguayan national, Mr. Angel Francisco Breard; whereas it is maintained that he was charged, tried, convicted of culpable homicide and sentenced to death by a Virginia court (the Circuit Court of Arlington County) in 1993, without having been informed, as is required under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, of his rights under that provision; whereas it is specified that among these rights are the right to request that the relevant consular office of the State of which he is national be advised of his arrest and detention, and the right to communicate with that office; and whereas it is also alleged that the authorities of the Commonwealth of Virginia also did not advise the Paraguayan consular officers of Mr. Breard's detention, and that those officers were only able to render assistance to him from 1996, when the Paraguayan Government learnt by its own means that Mr. Breard was imprisoned in the United States;

3. Whereas, in the Application, Paraguay states that Mr. Breard's subsequent petitions before federal courts in order to seek a writ of *habeas corpus* failed, the federal court of first instance having, on the basis of the doctrine of "procedural default", denied him the right to invoke the Vienna Convention for the first time before that court, and the intermediate federal appellate court having confirmed that decision; whereas, consequently, the Virginia court that sentenced Mr. Breard to the death penalty set an execution date of 14 April 1998; whereas Mr. Breard, having exhausted all means of legal recourse available to him as of right, petitioned the United States Supreme Court for a writ of *certiorari*, requesting it to exercise its discretionary power to review the decision given by the lower federal courts and to grant a stay of his execution pending that review, and whereas, while this request is still pending before the Supreme Court, it is however rare for that Court to accede to such requests; and whereas Paraguay stated, moreover, that it brought proceedings itself before the federal courts of the United States as early as 1996, with a view to obtaining the annulment of the proceedings initiated against Mr. Breard, but both the federal court of first instance and the federal appellate court held that they had no jurisdiction in the case because it was barred by a doctrine conferring "sovereign immunity" on federated states; whereas Paraguay also filed a petition for a writ of *certiorari* in the Supreme Court, which is also still pending; and whereas Paraguay furthermore engaged in diplomatic efforts with the Government of the United States and sought the good offices of the Department of State;

4. Whereas, in its Application, Paraguay maintains that by violating its obligations under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States prevented Paraguay from exercising the consular functions provided for in Articles 5 and 36 of the Convention and specifically for ensuring the protection of its interests and of those of its nationals in the United States; whereas Paraguay states that it was not able to contact Mr. Breard nor to offer him the necessary assistance, and whereas accordingly Mr. Breard "made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation"; and "did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay"; and whereas Paraguay concludes from this that it is entitled to *restitutio in integrum*, that is to say "the re-establishment of the situation that existed before the United States failed to provide the notifications . . . required by the Convention";

5. Whereas Paraguay requests the Court to adjudge and declare as follows:

> "(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum;*

(3) that the United States is under an international legal obligation not to apply to the doctrine of 'procedural default', or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts";

6. Whereas, on 3 April 1998, after having filed its Application, Paraguay also submitted an urgent request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

7. Whereas, in its request for the indication of provisional measures, Paraguay refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein; and whereas it reaffirms in particular that the United States has violated its obligations under the Vienna Convention and must restore the *status quo ante;*

8. Whereas, in its request for the indication of provisional measures of protection, Paraguay states that, on 25 February 1998, the Circuit Court of Arlington County, Virginia, ordered that Mr. Breard be executed on 14 April 1998; whereas it emphasizes that "[t]he importance and sanctity of an individual human life are well established in international law" and "[a]s recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law"; and whereas Paraguay states in the following terms the grounds for its request and the possible consequences of its dismissal:

> "Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour";

9. Whereas Paraguay asks that, pending final judgment in this case, the Court indicate:

> "*(a)* That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;

*(b)* That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph *(a)* immediately above and the results of those actions; and

*(c)* That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case";

and whereas it asks the Court moreover to consider its request as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat that the authorities . . . will execute a Paraguayan citizen";

10. Whereas, on 3 April 1998, the Ambassador of Paraguay to the Netherlands addressed a letter to the President of the Court requesting the Court to fix an early date for a hearing on his Government's request for provisional measures, asking the Member of the Court who, in accordance with the provisions of Article 13, paragraph 1, and Article 32, paragraph 1, of the Rules of Court, would exercise the functions of President in the case to "call upon the United States of America to ensure that Mr. Breard is not put to death before the Court's ruling on Paraguay's request for provisional measures"; and indicating that he had been appointed as Agent of Paraguay for the purposes of the case;

11. Whereas, on 3 April 1998, the date on which the Application and the request for provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents, communicated the text of them to that Government by facsimile and sent it a certified copy of the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, of the Rules of Court, together with a certified copy of the request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also sent the Government of the United States a copy of the letter addressed that day to the President of the Court by the Agent of Paraguay;

12. Whereas, by identical letters dated 3 April 1998, the Vice-President of the Court addressed both Parties in the following terms:

"Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of both Parties to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects";

and whereas, at a meeting held the same day with the representatives of both Parties, he advised them that the Court would hold public hearings on 7 April 1998 at 10 a.m., in order to afford the Parties the opportunity of presenting their observations on the request for provisional measures;

13. Whereas, by a letter dated 5 April 1998, received in the Registry on 6 April 1998, the Ambassador of the United States to the Netherlands informed the Court of the appointment of an Agent and a Co-Agent of his Government for the case;

14. Whereas, pending the notification under Article 40, paragraph 3, of the Statute of the Court and Article 42 of the Rules of Court, by transmission of the printed text, in two languages, of the Application to the Members of the United Nations and to other States entitled to appear before the Court, the Registrar, on 6 April 1998, informed those States of the filing of the Application and of its subject-matter, and of the request for the indication of provisional measures;

15. Whereas, on 6 April 1998, the Registrar, in accordance with Article 43 of the Rules of Court, addressed the notification provided for in Article 63, paragraph 1, of the Statute to the States, other than the Parties to the dispute, which on the basis of information supplied by the Secretary-General of the United Nations as depositary appeared to be parties to the Vienna Convention and to the Optional Protocol;

16. Whereas, at the public hearings held on 7 April 1998, in accordance with Article 74, paragraph 3, of

the Rules of Court, oral statements on the request for the indication of provisional measures were presented by the Parties:

*On behalf of Paraguay:* by H. E. Mr. Manuel María Cáceres,
Mr. Donald Francis Donovan,
Mr. Barton Legum,
Dr. José Emilio Gorostiaga;

*On behalf of the United States:* by Mr. David R. Andrews,
Ms Catherine Brown,
Mr. John R. Crook,
Mr. Michael J. Matheson;

and whereas at the hearings a question was put by a Member of the Court, to which a reply was given orally and in writing;

*

* *

17. Whereas, at the hearings, Paraguay reiterated the line of argument set forth in its Application and its request for the indication of provisional measures;

18. Whereas at the hearing, the United States argued that Mr. Breard's guilt was well established, and pointed out that the accused had admitted his guilt, which Paraguay did not dispute; whereas it recognized that Mr. Breard had not been informed, at the time of his arrest and trial, of his rights under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, and indicated to the Court that this omission was not deliberate; whereas it nonetheless maintained that the person concerned had had all necessary legal assistance, that he understood English well and that the assistance of consular officers would not have changed the outcome of the proceedings brought against him in any way; whereas, referring to State practice in these matters, it stated that the notification provided for by Article 36, subparagraph 1 *(b)*, of the Vienna Convention is unevenly made, and that when a claim is made for failure to notify, the only consequence is that apologies are presented by the government responsible; and whereas it submitted that the automatic invalidation of the proceedings initiated and the return to the *status quo ante* as penalties for the failure to notify not only find no support in State practice, but would be unworkable;

19. Whereas the United States also indicated that the State Department had done everything in its power to help the Government of Paraguay as soon as it was informed of the situation in 1996; and whereas it stated that when, on 30 March 1998, Paraguay advised the Government of the United States of its intention to bring proceedings before the Court if the United States Government did not take steps to initiate consultation and to obtain a stay of execution for Mr. Breard, the Government of the United States had emphasized *inter alia* that a stay of execution depended exclusively on the United States Supreme Court and the Governor of Virginia;

20. Whereas the United States furthermore maintained that Paraguay's contention that the invalidation of the sentence of a person who had not been notified pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention could be required under that instrument, has no foundation in the relevant

provisions, their *travaux préparatoires* or the practice of States, and that, in the event, Mr. Breard has not been prejudiced by the absence of notification; and whereas it pointed out that provisional measures should not be indicated where it appears that the Applicant's argument will not enable it to be successful on the merits;

21. Whereas the United States also stated that, when the Court indicates provisional measures under Article 41 of its Statute, it must take the rights of each of the Parties into consideration and ensure that it maintains a fair balance in protecting those rights; whereas that would not be the case if it acceded to Paraguay's request in these proceedings; and whereas the measures requested by Paraguay would prejudice the merits of the case;

22. Whereas the United States finally alleged that the indication of the provisional measures requested by Paraguay would be contrary to the interests of the States parties to the Vienna Convention and to those of the international community as a whole as well as to those of the Court, and would in particular be such as seriously to disrupt the criminal justice systems of the States parties to the Convention, given the risk of proliferation of cases; and whereas it stated in that connection that States have an overriding interest in avoiding external judicial intervention which would interfere with the execution of a sentence passed at the end of an orderly process meeting the relevant human rights standards;

*

* *

23. Whereas on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;

24. Whereas Article I of the Optional Protocol, which Paraguay invokes as the basis of jurisdiction of the Court in this case, is worded as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol";

25. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Paraguay and the United States are parties to the Vienna Convention and to the Optional Protocol, in each case without reservation;

26. Whereas Articles II and III of the aforementioned Protocol provide that within a period of two months after one party has notified the other of the existence of a dispute, the parties may agree to resort not to the International Court of Justice but to an arbitration tribunal or alternatively first to conciliation; but whereas these Articles

> "when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention . . ." (*United States Diplomatic and Consular Staff in Tehran, (United States of America* v. *Iran), Judgment, 24 May 1980, I.C.J. Reports 1980*, pp. 25-26);

27. Whereas, in its Application and at the hearings, Paraguay stated that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol; and whereas it concluded from this that the Court has the jurisdiction necessary to indicate the provisional measures requested;

28. Whereas at the hearing, the United States contended, for its part, that Paraguay had not established that the Court had jurisdiction in these proceedings, even prima facie; whereas it argued that there is no dispute between the Parties as to the interpretation of Article 36, subparagraph 1 *(b)*, of the Vienna Convention and nor is there a dispute as to its application, since the United States recognizes that the notification provided for was not carried out; whereas the United States maintained that the objections raised by Paraguay to the proceedings brought against its national do not constitute a dispute concerning the interpretation or application of the Vienna Convention; and whereas it added that there was no entitlement to *restitutio in integrum* under the terms of that Convention;

29. Whereas the United States moreover indicated to the Court that it had expressed its regret to Paraguay for the failure to notify Mr. Breard of his right to consular access, engaged in consultations with Paraguay on the matter and taken steps to ensure future compliance with its obligations under the Vienna Convention at both the federal and state level;

30. Whereas Paraguay asserts that it is nevertheless entitled to *restitutio in integrum*, that any criminal liability currently imposed on Mr. Breard should accordingly be recognized as void by the legal authorities of the United States and that the *status quo ante* should be restored in that Mr. Breard should have the benefit of the provisions of the Vienna Convention in any renewed proceedings brought against him, no objection to his continued detention meanwhile being made by Paraguay; whereas however the United States believes that these measures are not required by the Vienna Convention, would contravene the understanding underlying the adoption of Article 36 as well as the uniform practice of States, and would put this Court in a position of acting as a universal supreme court of criminal appeals;

31. Whereas there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof; and whereas this is a dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963;

32. Whereas the United States claimed nevertheless that prima facie there is no jurisdiction for the Court in this case as Paraguay has no legally cognizable claim to the relief it seeks nor any prospect ultimately of prevailing on the merits, because no prejudice to Mr. Breard has occurred;

33. Whereas the existence of the relief sought by Paraguay under the Convention can only be determined at the stage of the merits; and whereas the issue of whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence can equally only be decided upon at the merits;

34. Whereas the Court finds that, prima facie, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Paraguay and the United States;

* *

35. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent; and whereas such measures are only justified if there is urgency;

36. Whereas the Court will not order interim measures in the absence of "irreparable prejudice . . . to rights which are the subject of dispute . . ." (*Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 103; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34);

37. Whereas the execution of Mr. Breard is ordered for 14 April 1998; and whereas such an execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims;

38. Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal;

*

* *

39. Whereas, in the light of the aforementioned considerations, the Court finds that the circumstances require it to indicate, as a matter of urgency, provisional measures in accordance with Article 41 of its Statute;

40. Whereas measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way prejudge findings the Court might make on the merits; and whereas the measures indicated would preserve the respective rights of Paraguay and of the United States; and whereas it is appropriate that the Court, with the co-operation of the Parties, ensure that any decision on the merits be reached with all possible expedition;

41. For these reasons,

THE COURT

Unanimously,

I. *Indicates* the following provisional measures:

The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

II. *Decides*, that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this ninth day of April, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Paraguay and the Government of the United States of America, respectively.

*(Signed)* Christopher G. WEERAMANTRY,
Vice-President.

*(Signed)* Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judges ODA and KOROMA append declarations to the Order of the Court.

*(Initialled)* C.G.W.

*(Initialled)* E. V.O.

---

Richmond Times-Dispatch

RICHMOND, VIRGINIA 23293

VIRGINIA'S NEWS LEADER
A MEDIA GENERAL NEWSPAPER

FRIDAY, APRIL 10, 1998

# Try to stop execution, U.S. told

## *U.N. court asks new trial for Paraguayan inmate*

BY FRANK GREEN
TIMES-DISPATCH STAFF WRITER

In the first ruling of its kind, the United Nations International Court of Justice yesterday ordered the United States "to take all measures at its disposal" to stop Tuesday's execution of Angel Francisco Breard in Virginia.

The 15 judges, acting unanimously, wanted time to resolve Paraguay's complaint that Breard was arrested, tried and convicted in violation of his Vienna Convention rights and request that Breard get a new trial.

Breard

Such decisions can take five years, but yesterday the court said it would expedite the matter. Breard, a Paraguayan, was sentenced to death for a 1992 attempted rape and stabbing death in Arlington.

"We are urgently exploring the legal effects of the court's order with the Department of Justice. I don't want to speculate on how the Supreme Court and the state of Virginia will resolve this matter," James Rubin, spokesman for the State Department, said yesterday.

Rubin said "the state of Virginia has the order. We expect it to be lodged with the U.S. Supreme Court today. The U.S. Supreme Court has asked the U.S. government

# Try to stop execution, U.S. told

**BREARD** *FROM PAGE A1*

to file a statement of its position on the matter on Monday."

"The unprecedented situation presents a number of options.

"The State Department may request that Virginia comply with the international court's decision. Breard's or Paraguay's lawyers may bring the international court's ruling before court in the United States. Or Gov. Jim Gilmore could be asked to grant Breard a reprieve until the matter can be settled.

"Yesterday's order was what the court calls a "provisional measure." Full judgments by the international court can be enforced only through the U.N. Security Council, where the U.S. has veto power.

"In any case, the ruling draws international attention to Virginia's criminal justice system, and to Gilmore, who is considering a clemency petition from Breard. Virginia ranks second in the nation in executions — 249 — since the death penalty resumed in 1977.

Asked Gilmore's reaction to the international court's ruling, his spokesman, Mark A. Miner, said yesterday that "the governor will continue to follow the U.S. courts and the United States Supreme Court."

**Appeals get review**

The United States Supreme Court, which two days ago asked for the justice department's opinion in the matter, is considering appeals and stay of execution requests from Breard and Paraguay.

David Botkins, a spokesman for Virginia Attorney General Mark Earley, said "Earley is aware of the provisional measure that came down this morning . . . but Virginia's full attention is on the United States Supreme Court and we oppose the granting of a stay."

Alexander H. Slaughter, one of Breard's lawyers, said that "we, Breard's counsel, Paraguay, the United States and Virginia are now in uncharted waters because this action by the International Court of Justice is unprecedented.

"Our immediate problem is trying to establish a way within the American judicial system, or before the governor, to seek relief for our client — that is a reprieve until the international court of justice can complete its proceedings," he said.

Philippe Sands, a professor of law at London University and an expert on the court, said the ruling is significant for two reasons: It is unanimous, which is "extremely rare" for the court, and it is the first time he is aware that the court's president, an American, Stephen M. Schwebel, has voted against the United States.

**'An obligation'**

He said the import of the ruling is that "the U.S. government has an obligation under international law, not necessarily domestic law, to bring this to the attention of the state of Virginia and do everything at its disposal to stop Virginia from executing" Breard.

"It is a clear and unambiguous decision. . . . I'm particularly struck by what Judge Schwebel said," said Sands, who is a visiting professor of law at the University of Richmond this week.

Schwebel wrote that "I have voted for the order, but with disquiet. The sensitive issues it poses have been hastily, if ably, argued. The evidence introduced is bare."

He added, "Not only has the United States apologized to Paraguay" in the Breard matter, "but it has taken substantial steps to" make sure law enforcement agencies comply with Article 36 of the Vienna Convention.

Article 36 requires foreign nationals who have been arrested in the U.S. to be told they have a right to contact their embassy's consular office.

Consul officials are also supposed

thorities.

Neither requirement was met in the Breard case. And, said Schwebel, in this case, "an apology . . . does not assist the accused." Also, the United States has a strong interest in seeing that this treaty is honored in order to protect its own citizens traveling in other countries, he said.

"In my view, these considerations outweigh the serious difficulties which this order imposes on the authorities of the United States and Virginia," he said.

The court, which meets in the Hague, Netherlands, said it did not seek to rule on whether Virginia or any state had the right to execute criminals and said that it had no wish to become "a court of criminal appeal."

Marc Thiessen, a spokesman for frequent U.N. critic and chairman of the foreign relations committee, Sen. Jesse Helms, R-North Carolina, said "it's an appalling intrusion by the United Nations into the affairs of the state of Virginia."

BEST AVAILABLE COPY

# International Court of Justice

## Press Communiqué 98/17



9 April 1998

**Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)**

**Provisional measures**

**The Court calls on the United States to take measures to prevent the execution of Angel Breard, pending a final decision**

THE HAGUE, 9 April 1998. The International Court of Justice (ICJ) today called on the United States to "take all measures at its disposal" to prevent the execution of Mr. Angel Francisco Breard, pending a final decision of the Court in the proceedings instituted by Paraguay. Mr. Breard is a Paraguayan national convicted of murder in Virginia (United States) whose execution is scheduled for 14 April 1998.

In its Order, adopted unanimously, the Court also requested the United States to inform it of all the measures taken in implementation of it.

Paraguay instituted proceedings against the United States on 3 April 1998 in a dispute concerning alleged violations of the Vienna Convention on Consular Relations of 24 April 1963. It maintains that Mr. Breard was arrested, tried, convicted and sentenced to death without Virginia advising him of his right to assistance by the consular officers of Paraguay, as required by the Vienna Convention. Accordingly, Paraguay asked the Court to adjudge and declare that it is entitled to restitutio in integrum, that is, the re-establishment of the situation that existed before the United States failed to provide the required notification. In view of the urgency of the case, Paraguay also requested the Court to indicate provisional measures to the effect that the United States should refrain from executing Mr. Breard before the Court could consider Paraguay's claims. Paraguay made clear that it does not seek the release of Mr. Breard.

In the reasoning leading to its decision, the Court finds that the execution of Mr. Breard "would render impossible the ordering by the Court of the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims".

The Court nevertheless points out that the issues before it "do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes" and recalls that its function is "to resolve international legal disputes between States . . . and not to act as a court of criminal appeal".

It states that "it is appropriate that the Court, with the co-operation of the Parties, ensure that any decision on the merits be reached with all possible expedition".

The Court had established at the outset that a dispute exists prima facie between the Parties as to the application of the Vienna Convention and that it has jurisdiction prima facie to examine it. Paraguay and the United States are both parties to the Vienna Convention and to its Optional Protocol concerning the Compulsory Settlement of Disputes, Article I of which provides that"disputes arising out of the

Compulsory Settlement of Disputes, Article I of which provides that"disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice".

Further proceedings

Vice-President Weeramantry will soon convene a meeting with the Parties to consult them on the subsequent procedure. The Vice-President of the Court exercises the functions of the presidency in the case, as the President is a national of the United States.

After the Parties' views have been ascertained, time-limits will be fixed for the filing of written pleadings.

---

The Court was composed as follows in the case: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Registrar Valencia-Ospina.

President Schwebel, and Judges Oda and Koroma appended declarations to the Order.

---

The text of the declarations (in their original language) can be found in an Annex to this press release.

The full text of the Order and of the declarations (in their original language) is already available on the Court's Website (**http://www.icj-cij.org**).

A summary of the Order will be available later.

The printed text of the Order and of the declarations appended to it will become available in due course (orders and enquiries should be addressed to the Distribution and Sales Section, Office of the United Nations, 1211 Geneva 10; to the Sales Section, United Nations, New York, N.Y. 10017; or any appropriate specialized bookshop).

---

Information Office:

Mr. Arthur Witteveen, Secretary of the Court (tel: 31-70 302 2336)

Mrs. Laurence Blairon, Information Officer (tel: 31-70 302 2337)

Annex to Press Communiqué No. 98/17

**Declaration of President Schwebel**

I have voted for the Order, but with disquiet. The sensitive issues it poses have been hastily, if ably, argued. The evidence introduced is bare. The Court's consideration of the issues of law and fact, in the circumstances imposed upon it, has been summary. The United States maintains that no State has ever before claimed as Paraguay now does that, because of lack of consular access under the Vienna Convention on Consular Relations, the results of a trial, conviction, and appeal should be voided. Not only has the United States apologized to Paraguay for the unintentional failure of notification to Paraguay's consul of the arrest and trial of the accused, but it has taken substantial steps to strengthen what appears to be a practice in the United States of variable compliance with the obligations imposed upon it by the Vienna Convention.

All this said, I have voted for the Order indicating provisional measures suggested pursuant to

All this said, I have voted for the Order indicating provisional measures suggested pursuant to Article 41 of the Statute of the Court. Those measures ought to be taken to preserve the rights of Paraguay in a situation of incontestable urgency.

I have so voted essentially for these reasons. There is an admitted failure by the Commonwealth of Virginia to have afforded Paraguay timely consular access, that is to say, there is an admitted breach of treaty. An apology and Federal provision for avoidance of future such lapses does not assist the accused, who Paraguay alleges was or may have been prejudiced by lack of consular access, a question which is for the merits. It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

**Declaration of Judge Oda**

1. I voted in favour of the Court's Order with great hesitation as I believed and I still believe that the request for the indication of provisional measures of protection submitted by Paraguay to the Court should have been dismissed. However, in the limited time - one or two days - given to the Court to deal with this matter, I have found it impossible to develop my points sufficiently to persuade my colleagues to alter their position.

2. First of all, I would like to express some of my thoughts in connection with this request.

I can, on humanitarian grounds, understand the plight of Mr. Breard and recognize that owing to the fact that Paraguay filed this request on 3 April 1998, his fate now, albeit unreasonably, lies in the hands of the Court.

I would like to add, however, that, if Mr. Breard's rights as they relate to humanitarian issues are to be respected then, in parallel, the matter of the rights of victims of violent crime (a point which has often been overlooked) should be taken into consideration. It should also be noted that since his arrest, Mr. Breard has been treated fairly in all legal proceedings within the American judicial system governed by the rule of law.

The Court cannot act as a court of criminal appeal and cannot be petitioned for writs of habeas corpus. The Court does not have jurisdiction to decide matters relating to capital punishment and its execution, and should not intervene in such matters.

* *

3. As stated earlier, Paraguay's request was presented to the Court on 3 April 1998 in connection with and at the same time as its Application instituting proceedings against the United States for violations of the 1963 Vienna Convention on Consular Relations. Paraguay's Application was unilaterally submitted to the Court on the basis of the Optional Protocol. I very much doubt that, on the date of filing of the Application and the request, there was any "dispute[s] arising out of the interpretation or application of the [Vienna] Convention" (Optional Protocol, Article I).

If there was any dispute between Paraguay and the United States concerning the interpretation or application of the Vienna Convention, it could have been that the United States was presumed to have violated the Convention at the time of the arrest of Mr. Breard in 1992, as the United States did not inform the Paraguayan consul of that event.

This issue was raised by Paraguay when it became aware of Mr. Breard's situation. In 1996, negotiations took place between Paraguay and the United States concerning the consular function provided for under the Convention. In July 1997, the United States proceeded to remedy the

provided for under the Convention. In July 1997, the United States proceeded to remedy the violation by sending a letter to the Government of Paraguay apologizing for its failure to inform the consul of the events concerning Mr. Breard and giving an assurance that this failure would not be repeated in future. In my view, the United States was thus released from its responsibility for violation of the Vienna Convention.

From that time, the question of violation of the Vienna Convention, which may have led to a dispute concerning its application and interpretation, no longer existed. However, this question was raised once more on 3 April 1998, the date on which Paraguay's Application was filed.

4. What did Paraguay ask the Court to decide in its Application of 3 April 1998? Paraguay asked mainly for a decision relating to Mr. Breard's personal situation, namely, his pending execution by the competent authorities of the State of Virginia.

Paraguay requested restitutio in integrum. However, if consular contact had occurred at the time of Mr. Breard's arrest or detention, the judicial procedure in the United States domestic courts relating to his case would have been no different. This point was made clear in the pleadings of both Parties.

* *

5. I would like to turn to some general issues relating to provisional measures. First, as a general rule, provisional measures are granted in order to preserve rights exposed to imminent breach which is irreparable and these rights must be those to be considered at the merits stage of the case, and must constitute the subject-matter of the Application or be directly related to it. In this case, however, there is no question of such rights (of States parties), as provided for by the Vienna Convention, being exposed to an imminent irreparable breach.

6. Secondly, in order that provisional measures may be granted by the Court, the Court has to have, at the very least, prima facie jurisdiction to deal with the issues concerning the rights of the States parties. However I believe that, as regards the present request for provisional measures, the Court does not even have prima facie jurisdiction to handle this matter.

7. Thirdly, if the request in the present case had not been granted, the Application itself would have become meaningless. If that had been the case, then I would have had no hesitation in pointing out that the request for provisional measures should not be used to ensure that the main Application continue. In addition the request for provisional measures should not be used by applicants for the purpose of obtaining interim judgments that would affirm their own rights and predetermine the main case.

8. I have thus explained why I formed the view that, given the fundamental nature of provisional measures, those measures should not have been indicated upon Paraguay's request.

I reiterate, however, that I voted in favour of the Order, for humanitarian reasons, and in view of the fact that, if the execution were to be carried out on 14 April 1998, whatever findings the Court might have reached might be without object.

**Declaration of Judge Koroma**

My decision to vote in favour of the Order granting the interim measures of protection in this matter was reached only after careful consideration and in the light of the urgency and exceptional circumstances of this case. Torn as I was between the need to observe the requirements for granting provisional measures of protection under Article 41 of the Statute of the Court, thereby ensuring that whatever decision the Court might reach should not be devoid of object, and the need for the Court to comply with its jurisdiction to settle disputes between States which, in my view, includes respect for the sovereignty of a State in relation to its criminal justice system.

It was, therefore, both propitious and appropriate, for the Court to bear in mind its mission which is to decide disputes between States, and not to act as a universal supreme court of criminal appeal. On the other hand, it is equally true that the Court's function is to decide disputes between States which are submitted to it in accordance with international law, applying international conventions, etc. The Order, in my judgement, complies with these requirements.

Paraguay's Application, filed on 3 April 1998 instituting proceedings against the United States for purported violations of the 1963 Vienna Convention on Consular Relations, inter alia, requested the Court to grant provisional measures of protection under Article 41 of the Statute so as to protect its rights and the right of one of its nationals who had been convicted of a capital offence committed in the United States and sentenced to death.

The purpose of a request for provisional measures is to preserve as well as to safeguard the rights of the parties that are in dispute, especially when such rights or subject matter of the dispute could be irretrievably or irreparably destroyed thereby rendering the Court's decision ineffective or without object. It is in the light of such circumstances that the Court has found it necessary to indicate interim measures of protection with the aim of preserving the respective rights of either party to the dispute. But prior to this, the applicant State has the burden of indicating that prima facie, the Court has jurisdiction.

When the facts presented were considered by the Court in the light of the Vienna Convention on Consular Relations, in particular in relation to its Articles 5 and 36, and Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963, the Court reached the correct conclusion that a dispute existed and that its jurisdiction had been established prima facie.

In my view, in granting this Order, the Court met the requirements set out in Article 41 of the Statute, whilst at the same time the Order preserves the respective rights of either party - Paraguay and the United States. The Order called for the suspension of the sentence of execution of Mr. Breard on 14 April 1998, thereby preserving his right to life pending the final decision of the Court on this matter, and also recognized the United States' criminal sovereignty in matters such as charging, trying, convicting and sentencing suspects as appropriate, within the United States or its jurisdiction. I concur with this finding.

In reaching this decision, the Court has also acted with the necessary judicial prudence in considering a request for interim measures of protection, in that it should not deal with issues which are not immediately relevant for the protection of the respective rights of either party or which are for the merits. It also thus, once again confirmed its consistent jurisprudence that a provisional measure of protection should only be granted where it is indispensable and necessary for the preservation of the respective rights of either party and only with circumspection. It was in the light of the foregoing consideration, that I joined the Court in granting the request under Article 41 of the Statute.

| Home Page | What's new | Docket | List of cases | General Information | Basic documents | Publicat

Per Curiam

# SUPREME COURT OF THE UNITED STATES

Nos. 97–8214 (A–732), 97–1390 (A–738), 97–8660 (A–767), and No. 125, Orig. (A–771)

ANGEL FRANCISCO BREARD
97–8214 (A–732) *v.*
FRED W. GREENE, WARDEN

ON APPLICATION FOR STAY AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE REPUBLIC OF PARAGUAY ET AL.,
97–1390 (A–738) *v.*
JAMES S. GILMORE, GOVERNOR OF VIRGINIA, ET AL.

ON APPLICATION FOR STAY OR INJUNCTION AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IN RE ANGEL FRANCISCO BREARD
97–8660 (A–767)

ON APPLICATION FOR STAY AND ON PETITION FOR WRIT OF HABEAS CORPUS

REPUBLIC OF PARAGUAY ET AL.,
No. 125 Orig. (A–771) *v.*
JAMES GILMORE, III, GOVERNOR OF VIRGINIA, ET AL.

ON APPLICATION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION AND ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

[April 14, 1998]

PER CURIAM.

Angel Francisco Breard is scheduled to be executed by the Commonwealth of Virginia this evening at 9:00 p.m.

Breard, a citizen of Paraguay, came to the United States in 1986, at the age of 20. In 1992, Breard was charged with the attempted rape and capital murder of Ruth Dickie. At his trial in 1993, the State presented overwhelming evidence of guilt, including semen found on Dickie's body matching Breard's DNA profile and hairs on Dickie's body identical in all microscopic characteristics to hair samples taken from Breard. Breard chose to take the witness stand in his defense. During his testimony, Breard confessed to killing Dickie, but explained that he had only done so because of a Satanic curse placed on him by his father-in-law. Following a jury trial in the Circuit Court of Arlington County, Virginia, Breard was convicted of both charges and sentenced to death. On appeal, the Virginia Supreme Court affirmed Breard's convictions and sentences, *Breard* v. *Commonwealth*, 248 Va. 68, 445 S. E. 2d 670 (1994), and we denied certiorari, 513 U. S. 971 (1994). State collateral relief was subsequently denied as well.

Breard then filed a motion for habeas relief under 28 U. S. C. §2254 in Federal District Court on August 20, 1996. In that motion, Breard argued for the first time that his conviction and sentence should be overturned because of alleged violations of the Vienna Convention on Consular Relations (Vienna Convention), April 24, 1963, [1970] 21 U. S. T. 77, T.I.A.S. No. 6820, at the time of his arrest. Specifically, Breard alleged that the Vienna Convention was violated when the arresting authorities failed to inform him that, as a foreign national, he had the right to contact the Paraguayan Consulate. The District Court rejected this claim, concluding that Breard procedurally defaulted the claim when he failed to raise it in state court and that Breard could not demonstrate cause and prejudice for this default. *Breard* v. *Netherland*, 949 F. Supp. 1255, 1266 (ED Va. 1996). The Fourth Circuit affirmed. *Breard* v. *Pruett*, 134 F. 3d 615, 620 (1998). Breard has

petitioned this Court for a writ of certiorari.

In September 1996, the Republic of Paraguay, the Ambassador of Paraguay to the United States, and the Consul General of Paraguay to the United States (collectively Paraguay) brought suit in Federal District Court against certain Virginia officials, alleging that their separate rights under the Vienna Convention had been violated by the Commonwealth's failure to inform Breard of his rights under the treaty and to inform the Paraguayan consulate of Breard's arrest, conviction, and sentence. In addition, the Consul General asserted a parallel claim under 42 U. S. C. §1983, alleging a denial of his rights under the Vienna Convention. The District Court concluded that it lacked subject-matter jurisdiction over these suits because Paraguay was not alleging a "continuing violation of federal law" and therefore could not bring its claims within the exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U. S. 123 (1908). *Republic of Paraguay* v. *Allen*, 949 F. Supp. 1269, 1272–1273 (ED Va. 1996). The Fourth Circuit affirmed on Eleventh Amendment grounds. *Republic of Paraguay* v. *Allen*, 134 F. 3d 622 (1998). Paraguay has also petitioned this Court for a writ of certiorari.

On April 3, 1998, nearly five years after Breard's conviction became final, the Republic of Paraguay instituted proceedings against the United States in the International Court of Justice (ICJ), alleging that the United States violated the Vienna Convention at the time of Breard's arrest. On April 9, the ICJ noted jurisdiction and issued an order requesting that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings . . . ." The ICJ set a briefing schedule for this matter, with oral argument likely to be held this November. Breard then filed a petition for an original writ of habeas corpus and a stay application in this Court in order

to "enforce" the ICJ's order. Paraguay filed a motion for leave to file a bill of complaint in this Court, citing this Court's original jurisdiction over cases "affecting Ambassadors . . . and Consuls." U. S. Const., Art. III, §2.

It is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts. Nevertheless, in their petitions for certiorari, both Breard and Paraguay contend that Breard's Vienna Convention claim may be heard in federal court because the Convention is the "supreme law of the land" and thus trumps the procedural default doctrine. Pet. for Cert. in No. 97–8214, pp. 15–18; Pet. for Cert. in No. 97–1390, p. 14, n. 8. This argument is plainly incorrect for two reasons.

First, while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. See *Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 723 (1988); *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U. S. 694, 700 (1988); *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 539 (1987). This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Article 36(2), [1970] 21 U. S. T., at 101. It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Claims not so raised are

considered defaulted. *Ibid.* By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review.

Second, although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. We have held "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Reid* v. *Covert,* 354 U. S. 1, 18 (1957) (plurality opinion); see also *Whitney* v. *Robertson,* 124 U. S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, "the one last in date will control the other"). The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969. But in 1996, before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a habeas petitioner alleging that he is held in violation of "treaties of the United States" will, as a general rule, not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings." 28 U. S. C. A. §§ 2254(a), (e)(2) (Supp. 1998). Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently-enacted rule, just as any claim arising under the United States Constitution would be. This rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him. Without a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have pro-

vided, and what factors he considered in electing to reject the plea bargain that the State offered him. That limitation, Breard also argues, is not justified because his Vienna Convention claims were so novel that he could not have discovered them any earlier. Assuming that were true, such novel claims would be barred on habeas review under *Teague* v. *Lane,* 489 U. S. 288 (1989).

Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial. *Arizona* v. *Fulminante,* 499 U. S. 279 (1991). In this case, no such showing could even arguably be made. Breard decided not to plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been. Breard's asserted prejudice—that had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty—is far more speculative than the claims of prejudice courts routinely reject in those cases were an inmate alleges that his plea of guilty was infected by attorney error. See, *e.g.*, *Hill* v. *Lockhart,* 474 U.S. 52, 59 (1985).

As for Paraguay's suits (both the original action and the case coming to us on petition for certiorari), neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions. The Eleventh Amendment provides a separate reason why Paraguay's suit might not succeed. That Amendment's "fundamental principle" that "the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State" was enunciated in *Principality of Mon-*

*aco* v. *Mississippi*, 292 U. S. 313, 329–330 (1934). Though Paraguay claims that its suit is within an exemption dealing with continuing consequences of past violations of federal rights, see *Milliken* v. *Bradley*, 433 U. S. 267 (1977), we do not agree. The failure to notify the Paraguayan Consul occurred long ago and has no continuing effect. The causal link present in *Milliken* is absent in this case.

Insofar as the Consul General seeks to base his claims on §1983, his suit is not cognizable. Section 1983 provides a cause of action to any "person within the jurisdiction" of the United States for the deprivation "of any rights, privileges, or immunities secured by the Constitution and laws." As an initial matter, it is clear that Paraguay is not authorized to bring suit under §1983. Paraguay is not a "person" as that term is used in §1983. See *Moor* v. *County of Alameda*, 411 U. S. 693, 699 (1973); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 323–324 (1966); cf. *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58 (1989). Nor is Paraguay "within the jurisdiction" of the United States. And since the Consul General is acting only in his official capacity, he has no greater ability to proceed under §1983 than does the country he represents. Any rights that the Consul General might have by virtue of the Vienna Convention exist for the benefit of Paraguay, not for him as an individual.

It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it on the basis of law. The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the

ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.

For the foregoing reasons, we deny the petition for an original writ of habeas corpus, the motion for leave to file a bill of complaint, the petitions for certiorari, and the accompanying stay applications filed by Breard and Paraguay.

Statement of JUSTICE SOUTER.

I agree with the Court that the lack of any reasonably arguable causal connection between the alleged treaty violations and Breard's conviction and sentence disentitle him to relief on any theory offered. Moreover, I have substantial doubts that either Paraguay or any official acting for it is a "person" within the meaning of 42 U. S. C. § 1983 and that the Vienna Convention is enforceable in any judicial proceeding now underway. For these reasons, I believe the stay requests should be denied, with the result that Paraguay's claims will be mooted. Accordingly, I have voted to deny Paraguay's and Breard's respective petitions for certiorari (Nos. 97-1390 and 97-8214), Paraguay's motion for leave to file a bill of complaint (No. 125 Orig.), Breard's application for an original writ of habeas corpus (No. 97-8660), and the associated requests for a stay of execution.

JUSTICE STEVENS, dissenting.

The Court of Appeals' decision denying petitioner's first application for a federal writ of habeas corpus became final on February 18, 1998. Under this Court's Rules, a timely petition for a writ of certiorari to review that decision could have been filed as late as May 19, 1998. See Rule 13.1 ("[A] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of

the judgment"). Ordinary review of that petition pursuant to our Rules would have given us additional time thereafter to consider its merits in the light of the response filed by the Commonwealth of Virginia. We have, however, been deprived of the normal time for considered deliberation by the Commonwealth's decision to set the date of petitioner's execution for today. There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases. Indeed, the international aspects of this case provide an additional reason for adhering to our established Rules and procedures. I would therefore grant the applications for a stay, and I respectfully dissent from the decision to act hastily rather than with the deliberation that is appropriate in a case of this character.

JUSTICE BREYER, dissenting.

In my view, several of the issues raised here are of sufficient difficulty to warrant less speedy consideration. Breard argues, for example, that the novelty of his Vienna Convention claim is sufficient to create "cause" for his having failed to present that claim to the Virginia state courts. Pet. for Cert. in No. 97–8214, at pp. 20–22. He might add that the nature of his claim, were we to accept it, is such as to create a "watershed rule of criminal procedure," which might overcome the bar to consideration otherwise posed by *Teague* v. *Lane*, 489 U. S. 288, 311 (1989). He additionally says that what the Solicitor General describes as Virginia's violation of the Convention "prejudiced" him by isolating him at a critical moment from Consular Officials who might have advised him to try to avoid the death penalty by pleading guilty. Pet. for Cert. in No. 97–8214, at p. 22; see Brief of United States Amicus Curiae 12 ("[T]he Executive Branch has conceded that the Vienna Convention was violated"). I cannot say, without examining the record more fully, that these arguments are

*obviously* without merit. Nor am I willing to accept without fuller briefing and consideration the positions taken by the majority on all of the sometimes difficult issues that the majority addresses.

At the same time, the international aspects of the case have provided us with the advantage of additional briefing even in the short time available. More time would likely mean additional briefing and argument, perhaps, for example, on the potential relevance of proceedings in an international forum.

Finally, as JUSTICE STEVENS points out, Virginia is now pursuing an execution schedule that leaves less time for argument and for Court consideration than the Court's rules provide for ordinary cases. Like JUSTICE STEVENS, I can find no special reason here to truncate the period of time that the Court's rules would otherwise make available.

For these reasons taken together I would grant the requested stay of execution and consider the petitions for certiorari in the ordinary course.

# SUPREME COURT OF THE UNITED STATES

No. 97–8214 (A–732)

ANGEL FRANCISCO BREARD, PETITIONER *v.* FRED W. GREENE, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[April 14, 1998]

JUSTICE GINSBURG, dissenting.

I would grant the application for a stay of execution in order to consider in the ordinary course the instant petition, Breard's first federal petition for writ of habeas corpus.

# SUPREME COURT OF THE UNITED STATES

No. 97–8214 (A–732)

ANGEL FRANCISCO BREARD, PETITIONER *v.* FRED W. GREENE, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[April 14, 1998]

JUSTICE GINSBURG, dissenting.

I would grant the application for a stay of execution in order to consider in the ordinary course the instant petition, Breard's first federal petition for writ of habeas corpus.

No. 97-8214

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

ANGEL FRANCISCO BREARD,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

# PETITIONER'S BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Imminent Execution Scheduled
April 14, 1998

Alexander H. Slaughter (VSB#05916)
Counsel of Record
William G. Broaddus (VSB#05284)
Dorothy C. Young (VSB#31155)
McGuire, Woods, Battle & Boothe LLP
One James Center, 901 E. Cary Street
Richmond, VA 23219
(804) 775-1085

Michele J. Brace (VSB No. 36748)
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-8439

Counsel to Angel Francisco Breard

Petitioner Angel Francisco Breard responds as follows to the Brief of the United States as Amicus Curiae:

1. 28 U.S.C. § 2254(a) makes collateral relief available to state prisoners who are in custody in "violation of the Constitution or laws or treaties of the United States." The Court's authority to grant collateral relief to Breard springs from Section 2254(a), not from the Vienna Convention. Therefore, the alleged lack of a remedy within the treaty itself is irrelevant to Breard's case.

2. The reason that Breard's claim based on violation of the Vienna Convention was not raised in a timely fashion is that the Commonwealth of Virginia, which had the obligation to notify Breard of his right to consular notification, did not do so in a timely fashion. It is unseemly, if not unconscionable, to make Breard bear the consequence (in this case the forfeiture of his life) of the state's dilatoriness. Reduced to its essence, the United States says that a criminal defendant or habeas petitioner must present a claim based on a failure of consular notification *before* he has been made aware of the existence of his right to consular notification. Merely to state this proposition is to illustrate its illogic. However appropriate the United States' position may be for the small number of detainees who have independent knowledge of their rights under Article 36(1) and can assert them in a timely manner, that position is irrational and unreasonable for most foreign nationals because they are in no position to protest the failure of consular notification until the receiving state informs them that a right to notification exists in the first place. For detainees like Breard, who were never notified of their right to consular notification (or who were notified only after it was too late to raise a timely claim under state law), the common-law rule of procedural bar does not "enable full effect to be given to the purpose for which the rights accorded under [Article 36(1)] are intended."

The United States misses the mark when it cites this Court's application of its procedural default jurisprudence to habeas corpus claims based on alleged violations of the United States Constitution. Congress could, if it chose, enact legislation providing that federal constitutional claims cannot be procedurally barred in habeas proceedings. It has not done so. The Vienna Convention, however, contains an express shield against the operation of procedural default when that domestic law impairs full effect from being given to specific provisions within the treaty, including the right to consular notification. The shield was part of the treaty to which the Senate consented, that the President ratified, and that is now the law of the land.

3. Citing Smith v. Murray, 477. U.S. 527 (1986), the United States suggests that the unavailability of a legal claim does not provide cause for a procedural default unless the legal basis for the claim was impossible to discover. The better interpretation of the "unavailability" exception to procedural default is contained in Reed v. Ross, 468 U.S. 1 (1984), and Coleman v. Thompson, 501 U.S. 722. Those cases require only "reasonable unavailability," meaning that compliance with the state procedural rule was "impracticable." Id. at 753.

4. The United States' "new rule" argument is the same as that raised by the habeas respondent. Even the lower court's most ardent scholars of the "new rule" jurisprudence did not find this argument persuasive, and neither should this Court. A treaty which has been the law of the land for more than a quarter of a century, which has been routinely complied with by federal law enforcement officials, and which has mandated consular notification for all detained foreign nationals from signatory countries is simply not a "new rule."

The consular notification provision was unavailable to Breard because of its obscurity, not because of its actual novelty. It was buried in a small number of legal authorities that explained or analyzed diplomatic or immigration law. Breard had no diplomatic status, and his immigration problems, if any, were not the proper concern of the lawyers appointed to defend him on charges of capital murder.[1]

## CONCLUSION

For the reasons stated above, Petitioner Angel Francisco Breard respectfully requests that his Application for a Stay of Execution be granted.

Respectfully submitted,

ANGEL FRANCISCO BREARD

By Counsel

Alexander H. Slaughter (VSB#05916)
William G. Broaddus (VSB#05284)
Dorothy C. Young (VSB#31155)
MCGUIRE, WOODS, BATTLE & BOOTHE LLP
One James Center, 901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000

Michele J. Brace (VSB# 36748)
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-8439

[1] If Breard's defense counsel had asked the state court for permission to incur the cost of researching diplomatic and immigration law, based on nothing more than speculative hope that they might find something to assist their client because he was a foreign national, there is no doubt that the state court would have denied the request.

## CERTIFICATE

I certify that a copy of the foregoing was faxed and hand-delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, and faxed to Seth P. Waxman, Esquire, Solicitor General of the United States, Office of the Solicitor General, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 on April ___, 1998.